No. 75-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

SOUTH PRAIRIE CONSTRUCTION CO.,
Petitioner,

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANLEY R. STRAUSS
MICHAEL J. BARTLETT
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Petitioner,
SOUTH PRAIRIE CONSTRUCTION CO.

Of Counsel:

VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

EDWARD E. SOULE
LYTLE SOULE & EMERY
2210 First National Center
Oklahoma City, Oklahoma 73102

WILSON · EPES PRINTING CO., INC. · RE 7-6002 · WASHINGTON, D. C. 20001

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

SOUTH PRAIRIE CONSTRUCTION CO.,
Petitioner,

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, South Prairie Construction Co. ("South Prairie") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 8, 1975. The judgment vacated an order of the National Labor Relations Board ("the Board") dismissing an unfair labor practice complaint against South Prairie and another company, Peter Kiewit Sons' Co. ("Kiewit Sons").

OPINIONS BELOW

The opinion by a majority of a panel of the court of appeals (Circuit Judge Leventhal and Judge Miller of the United States Court of Patent Appeals; Circuit Judge Tamm dissenting) is reported at 518 F. 2d 1040, and is reproduced in Appendix A, *infra*, pp. 1a-21a. The Board's Decision and Order, with an attached Decision of the Administrative Law Judge, are reported at 206 NLRB 562, and are reproduced in Appendix B, *infra*, pp. 22a-84a.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1975. A timely petition for rehearing was denied on November 4, 1975 (App. C, *infra*, pp. 85a-86a). Also on the latter date, a majority of the court of appeals, with Circuit Judges Tamm, MacKinnon, Robb, and Wilkie disagreeing, denied a suggestion for rehearing *en banc* (App. D, *infra*, pp. 87a-88a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The National Labor Relations Board found in this case that two construction contractors constituted separate employers within the meaning of the National Labor Relations Act. The court of appeals set aside this finding and additionally ruled that a nonunion contractor must recognize the collective bargaining representative of a union contractor's employees and apply the union contractor's labor agreement to the nonunion contractor's employees. The questions presented are whether the rulings by the court of appeals:

(1) overstepped the proper bounds of judicial review;

(2) improperly disregarded the Board's construction industry policy of refusing to include employees of a nonunion contractor in the same unit as employees of a union contractor controlled by the same interests; and

(3) usurped the Board's statutory functions of determining appropriate units and fashioning appropriate remedies.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.* ("the Act"), are as follows:

> Sec. 8 (a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *
>
> Sec. 9 * * *
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . .
>
> * * * *

Sec. 10 * * *

(f) Any person aggrieved by a final order of the Board . . . may obtain review of such order . . . in the United States Court of Appeals for the District of Columbia . . . . [T]he court shall proceed . . . to make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive.[1]

STATEMENT OF THE CASE

In this case a majority of a panel of the court of appeals vacated an order of the National Labor Relations Board in which the Board dismissed a complaint against South Prairie and Kiewit Sons (App. A, *infra*, p. 20a; App. B, *infra*, p. 26a). The complaint alleged that South Prairie and Kiewit Sons violated Section 8(a)(5) of the National Labor Relations Act by their refusal to apply to South Prairie's employees the terms and conditions embodied in a collective bargaining contract executed by Kiewit Sons and Local No. 627, International Union of Operating Engineers ("the Union") (App. B, *infra*, p. 28a).

A. The Facts

Kiewit Sons, a Nebraska corporation, has engaged for many years in a variety of construction activi-

[1] The case was brought before the court of appeals pursuant to Section 10(f) of the Act. Section 10(e) of the Act, applicable to Board enforcement proceedings, contains language identical to the quoted 10(f) provision regarding the appropriate standard of appellate review.

ties, including highway construction, in Oklahoma (App. B, *infra*, pp. 23a, 28a). Since about 1960, the employees of Kiewit Sons have been represented by the Union, and the parties' collective bargaining relationship has resulted in a series of contracts culminating in an agreement effective from July 1970 to June 1973 (App. B, *infra*, pp. 29a-30a). Kiewit Sons was the only highway contractor in Oklahoma which had signed an agreement with the Union (App. B, *infra*, pp. 23a, 31a).

South Prairie, a Nebraska corporation, has engaged in highway construction in several states since 1944, but did not perform any work in Oklahoma prior to 1972 (App. B, *infra*, pp. 32a-34a). South Prairie has always been a nonunion contractor (App. B, *infra*, p. 32a).

Kiewit Sons and South Prairie are corporate subsidiaries of Peter Kiewit Sons', Inc. ("Kiewit Inc."). In December 1971, Kiewit Inc. activated South Prairie in Oklahoma. South Prairie was thus activated because Kiewit Sons' labor costs were higher than its nonunion competitors', and it was therefore hampered in its ability to bid competitively on Oklahoma highway contracts. South Prairie became actively engaged in highway construction work in Oklahoma beginning in March 1972. Thereafter, both South Prairie and Kiewit Sons performed highway construction in Oklahoma, but did not bid for the same highway projects (App. B, *infra*, pp. 23a, 25a).

During the period March-June 1972, the Union demanded that South Prairie recognize it as the collective bargaining agent for South Prairie's employees and that South Prairie apply Kiewit Sons' con-

tract to South Prairie's employees. However, the Union made no claim that a majority of the employees on South Prairie's payroll had selected the Union to represent them. South Prairie refused to accede to the Union's demand (App. B, *infra*, pp. 23a, 35a-39a).

Both before and after South Prairie's entry into the Oklahoma highway construction business, Kiewit Sons and South Prairie maintained separate legal identities and independent operational structures. The two companies have separate bank accounts, maintain wholly independent accounting records, and issue separate payroll checks to their respective employees. The officers and directors of Kiewit Sons are entirely distinct from the officers and directors of South Prairie. Kiewit Sons and South Prairie maintain offices at Kiewit Inc.'s headquarters in Omaha, Nebraska, but each company maintains a separate telephone number (App. B, *infra*, pp. 25a, 40a, 43a).

The Oklahoma operations of South Prairie are separate from the Oklahoma operations of Kiewit Sons. Thus South Prairie and Kiewit Sons maintain separate offices, separate telephone numbers, and separate storage facilities. Each company also maintains its own area supervisors and distinct supporting office staffs. South Prairie's field supervisors and employees in Oklahoma do not work on the same projects with Kiewit Sons' employees. Nor was there an interchange of employees or supervisors between the corporations after South Prairie became actively engaged in highway construction in Oklahoma. As is customary between contractors in the highway construction business, South Prairie and Kiewit lease

heavy equipment to one another at the going rental rate; however, both companies utilize their own tools and raw materials which they do not share with each other. Each company submits separate job bids, and each has a different dollar maximum fixed by Oklahoma for work which it may undertake. Neither company has ever subcontracted work to the other (App. B, *infra*, pp. 25a, 47a, 49a).

Kiewit Sons' labor policies are determined and administered by Kiewit Inc., whereas South Prairie's labor policies are determined and implemented independently, both in Oklahoma and elsewhere, by South Prairie's president. Accordingly, South Prairie's employees receive different, and generally lower, wages and benefits than those received by Kiewit Sons' employees under their union contract (App. B, *infra*, p. 25a).

B. The Board's Decision And Order

On the basis of the foregoing facts, the Board found that South Prairie and Kiewit Sons are separate employers under the Act, and that the employees of each company constitute a separate bargaining unit.[2]

---

[2] The Administrative Law Judge found that South Prairie and Kiewit Sons constituted a single employer within the meaning of the Act. Although not rejecting the Judge's findings based on fact (App. B, *infra*, pp. 22a-23a), the Board's contrary conclusion was based primarily upon the lack of record evidence to support the Judge's inferences that Kiewit Inc. actually controlled South Prairie's labor policies and that South Prairie was activated in Oklahoma to evade Kiewit Sons' contractual obligations to the Union (App. B, *infra*, pp. 23a-25a, 25a-26a, n. 4, 66a-71a, 73a-74a). The Board also implicitly rejected the undue weight accorded by the Judge to certain personnel transfers between Kiewit

Accordingly, the Board determined that neither South Prairie nor Kiewit Sons had an obligation to recognize the Union as the bargaining representative of South Prairie's employees, or to extend the terms of the Union's agreement with Kiewit Sons to South Prairie's employees. For this reason, and since the Union's claim for recognition was based solely on its contention that South Prairie and Kiewit Sons constituted a single employer, the Board dismissed the complaint in its entirety (App. B, *infra*, pp. 25a-27a).

C. The Decision Of The Court Of Appeals

A majority of a panel of the court of appeals reversed, ruling "that the Board's finding that respondents Kiewit and South Prairie are separate employers for purposes of the National Labor Relations Act is not warranted by the record"[3] (App. A, *infra*, pp. 14a-15a). Judge Tamm dissented from what he termed "this needless vacation of the Board's order, which has resulted from a factual disagreement between a majority of this division and the expert agency charged with the principal responsibility for administering our labor policy" (App. A, *infra*, p. 20a). The panel majority further determined that Kiewit Sons and South Prairie had an affirmative obligation to recognize the Union as the bargaining

---

Sons and South Prairie prior to the time South Prairie became actively engaged in highway construction work in Oklahoma (see App. B, *infra*, pp. 72a-73a).

[3] In this regard the panel majority cited *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944), decided some 7 years before this Court enunciated the substantial evidence test in *Universial Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 490-491 (1951).

representative of South Prairie's employees and to extend the terms of the Union-Kiewit Sons contract to South Prairie's employees (App. A, *infra*, pp. 19a-20a).

The panel majority remanded the case to the Board with the direction that the Board enter an order in conformity with, and limited to, the panel majority's rulings (App. A, *infra*, p. 20a).

REASONS FOR GRANTING THE WRIT

This case presents a significant issue involving the proper scope of judicial review concerning the Board's power to decide whether two distinct corporate entities are in fact separate employers under the National Labor Relations Act.[4] The issue takes on added significance in this case, and impacts the construction industry generally, in view of: (1) the Board's recognition that it is common practice in the construction industry for the same interests to own and operate separate organizations in the same geographical area, one to handle contracts under union conditions and the other under nonunion conditions (App. B, *infra*, p. 23a); and (2) the Board's policy with respect to the construction industry of not including employees of a nonunion contractor in the same bargaining unit with those of a union contractor controlled by the same interests, and of not apply-

---

[4] In *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), this Court approved the Board's application of the following controlling criteria for determining whether two nominally distinct business enterprises constituted a single employer under the Act: (1) interrelationship of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership.

ing the collective bargaining agreement of the unionized contractor to employees of the nonunion contractor (App. B, *infra*, pp. 23a-24a). The ruling by the panel majority below conflicts, we submit, with sound principles of judicial review and erroneously undermines a well established Board policy. Moreover, by ordering the placement of the employees of both South Prairie and Kiewit Sons into a single combined bargaining unit without prior Board consideration of the matter, the panel majority below usurped the unit determination function vested in the Board by Section 9(b) of the Act.

1. The only issue properly before the court of appeals was whether the Board's ultimate finding, that Kiewit Sons and South Prairie were separate employers, was supported by substantial evidence on the record considered as a whole. Sections 10(e), (f), National Labor Relations Act, as amended, 29 U.S.C. § 160(e), (f); *Universal Camera Corp.* v. *N.L.R.B.*, *supra*, 340 U.S. at 490-491. The panel majority below failed both to evoke this standard in its decision and to apply it to the Board's "separate employers" finding. Instead, the majority, while acknowledging the existence of the facts upon which the Board relied, combed the record and, as Judge Tamm in dissent perceived (App. A, *infra* p. 21a), seized upon other facts which it deemed to be of overriding significance in order to reach a contrary result.[5]

[5] For example, unlike the Board, the panel majority accorded great weight to certain personnel transfers between Kiewit Sons and South Prairie which occurred prior to the time South Prairie began actively performing highway construction work in Oklahoma (App. A, *infra*, pp. 13a-14a). However, the panel majority cited no evidence of the transfer of key personnel between the two companies after South Prairie became active in Oklahoma; indeed the panel majority specifically recognized the Administrative Law Judge's finding that there was little evidence of rank and file transfers between Kiewit Sons and South Prairie (App. A, *infra*, p. 13a, n. 13).

Moreover, the panel majority below not only failed to exercise the degree of judicial restraint required by the substantial evidence rule, it also totally disregarded the great weight to be accorded the Board's expertise in determining that, under all the circumstances herein, single employer status had not been established. *Universal Camera Corp.* v. *N.L.R.B.*, *supra*, 340 U.S. at 488. The decision by the panel majority below is all the more erroneous because in reviewing Board findings in other contexts, the District of Columbia Circuit has clearly recognized both the applicability of the substantial evidence test and

The panel majority also determined that Kiewit Inc.'s selection of South Prairie as the nonunion contractor to be activated in Oklahoma constituted centralized control by Kiewit Inc. over South Prairie's labor relations policies (App. A, *infra*, pp. 11a-12a). Such a determination overlooks the fact that South Prairie, as a nonunion contractor for almost 30 years, would naturally be expected to continue to operate nonunion in Oklahoma as well, and the additional fact that, as the Board emphasized, South Prairie's labor policies within its long existing nonunion framework were established and administered by South Prairie's president (App. B, *infra*, p. 25a). Surely, a determination as to what constitutes the centralized control of labor relations is a matter within the particular expertise of the Board. The very least that can be said for the Board's finding is that it made a choice between two fairly conflicting views, and under these circumstances the court below was not free to displace the Board's expert evaluation. *N.L.R.B.* v. *United Ins. Co.*, 390 U.S. 254, 260 (1968).

the necessity of according great weight to Board findings because they carry the authority of expertness. See, e.g., *Laborers' District Council* v. *N.L.R.B.*, 501 F.2d 868, 878 (D.C. Cir. 1974); *Local 374, Boiler Makers* v. *N.L.R.B.*, 331 F.2d 839, 840 (D.C. Cir. 1964). The decision of the panel majority in this case merely substituted its views concerning application of the criteria for determining "separate employer" status for those whose specialized knowledge and experience carry the authority which courts do not possess and therefore must respect. *N.L.R.B.* v. *United Ins. Co., supra*, 390 U.S. at 260; *Local 761, Electrical Wkrs.* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961). The Act's statutory scheme does not permit a standard of judicial review with respect to a Board decision concerning "separate employer" status which differs so radically from the standard recognized by this Court and applied by the court below with respect to Board decisions on other matters. *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 407 (1962). Accordingly, we submit that the decision by the panel majority below constitutes a gross misapplication of the substantial evidence standard which warrants this Court's intervention. *N.L.R.B.* v. *Walton Mfg. Co., supra*, 369 U.S. at 408; *Universal Camera Corp.* v. *N.L.R.B., supra*, 340 U.S. at 491.

2. The holding by the panel majority below, that Kiewit Sons and South Prairie constitute a single employer for collective bargaining purposes, also conflicts with a well established Board policy affecting the entire construction industry. It is common construction industry practice "for the same interests to have two separate organizations, one to handle contracts performed under union conditions and the

other under nonunion conditions" (App. B, *infra*, p. 23a). In recognition of this practice, the Board has established a policy of "refusing to include the employees of a nonunion company in the same bargaining unit with those of a union company controlled by the same interests and [of] refusing to require the nonunion company to recognize the bargaining representative of the union company's employees or to apply the collective bargaining contract with the latter to its own employees" (App. B, *infra*, pp. 23a-24a) (footnotes omitted). The Board has so held even where it has determined that the union and nonunion contractors constituted a single employer under the Act. *Central New Mexico Chapter, Nat'l Electrical Contractors Ass'n, Inc.*, 152 NLRB 1604, 1608 (1965). Matters of Board policy, such as that presented here, lie within the special competence of the expert Agency charged with the primary responsibility of effectuating the purposes of the Act, and are entitled therefore to great deference. *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 107 (1958); *N.L.R.B.* v. *Truck Drivers Local Union 449*, 353 U.S. 87, 96-97 (1957); *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941). The rejection by the panel majority below of the Board's policy thus raises a basic issue of general importance both to the Board's administration of the Act and to the operational structure of the construction industry.

3. It is a well established principle of labor law that the Board, and not the courts, has the broad authority and discretion—at least as an initial matter—to determine appropriate units. Section 9(b), National Labor Relations Act, as amended, 29 U.S.C. § 159(b); *Packard Motor Car Co.* v. *N.L.R.B.*, 330

U.S. 485, 491-493 (1947). Moreover, the fact that separate corporate entities may constitute a single employer under the Act "does not necessarily establish that an employerwide unit is appropriate, as the factors which are relevant in identifying the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit." *Central New Mexico Chapter, Nat'l Electrical Contractors Ass'n, Inc., supra,* 152 NLRB at 1608. *Accord*: *Gerace Construction, Inc.,* 193 NLRB 645, 650 (1971).

The panel majority, in ruling that the Union-Kiewit Sons agreement was to be applied to South Prairie's employees, stated that the Board gave no indication that if single employer status obtained, the Board would have disagreed with the conclusion that the employees of both contractors constituted a single appropriate bargaining unit (App. A, *infra,* p. 16a). The panel majority's rationale begs the issue. It is true that the Board did not state that a single unit of Kiewit Sons and South Prairie employees was not appropriate. The fact is, however, that in view of the Board's rejection of a single employer status for Kiewit Sons and South Prairie, the Board was not called upon to, and it did not, address this matter at all. Moreover, it certainly does not follow under Board precedent (*Central New Mexico, supra; Gerace Construction, supra*) that, if the Board had addressed the matter, it would have determined that a single unit was appropriate. Accordingly, even accepting as sound its single employer holding, the panel majority was required to remand the unit issue to the Board. Its failure to do so effectively usurped the unit determination function vested in the Board by Section 9(b) of the Act.

Finally, assuming the propriety of the panel majority's determination of single employer and single unit status, its further ruling that the Kiewit Sons-Union agreement must be applied to South Prairie's employees precluded the Board from exercising its discretion in fashioning a possible unfair labor practice remedy.[6] In this regard, we note that the 1970 contract at issue applied to Kiewit Sons and 6 other contractors on the one hand, and the Union and 29 other labor organizations on the other; none of the 6 other contractors engaged in highway construction in Oklahoma; the agreement applied as well to all subcontractors of the signatory contractors; and the agreement covered numerous types of construction work, only one of which was highway construction. Moreover, Kiewit Sons gave notice of its intent to terminate the contract with the Union after the underlying unfair labor practice herein had terminated.[7] Thus, scrutinization of the agreement and its possible termination were matters which required exploration

---

[6] "It is for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged" (*Machinists* v. *N.L.R.B.,* 311 U.S. 72, 82 (1940)), and no particular remedy flows from the Act itself. *Phelps Dodge Corp.* v. *N.L.R.B., supra,* 313 U.S. at 193-194. Since the Board never addressed the unit issue, even assuming that a determination of single employer status is well founded, the court was required to give the Board the widest possible latitude in fashioning an appropriate unfair labor practice remedy. *N.L.R.B.* v. *Food Store Employees Union,* 417 U.S. 1, 10 (1974).

[7] The notice of termination was not part of the record before the Board since such notice was given after the close of the Board's hearing in this case. However, the agreement's existence is a matter which properly would have been raised upon an appropriate remand to the Board.

before a determination of its applicability to South Prairie employees could be made. And, initially, such inquiry was for the Board and not the court.

In sum, the panel majority erroneously preempted to itself issues of unit determination and contract application which were appropriately within the Board's province.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY R. STRAUSS
MICHAEL J. BARTLETT
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Petitioner,
SOUTH PRAIRIE CONSTRUCTION CO.

Of Counsel:

VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

EDWARD E. SOULE
LYTLE SOULE & EMERY
2210 First National Center
Oklahoma City, Oklahoma 73102

Dated: February 1976.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 73-2277

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

SOUTH PRAIRIE CONSTRUCTION COMPANY and PETER KIEWIT SONS' COMPANY,
Intervenors.

Argued Feb. 24, 1975
Decided Sept. 8, 1975

* * * *

Before TAMM and LEVENTHAL, Circuit Judges, and MILLER,* Judge, United States Court of Customs and Patent Appeals.

Opinion for the Court filed by *Judge* MILLER.

MILLER, Judge:

Petitioner seeks review of the order of the National Labor Relations Board dismissing a section 8(a)(1) and (5) (29 U.S.C. § 158(a)(1) and (5))[1] com-

---

* Sitting by designation pursuant to 28 U.S.C. § 293(a).

[1] "(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

[Footnote continued on page 2a]

plaint issued September 6, 1972, against respondents Peter Kiewit Sons' Co. ("Kiewit") and South Prairie Construction Co. ("South Prairie"). The Board reversed the Administrative Law Judge ("ALJ") and found that Kiewit and South Prairie had no obligation to recognize petitioner, Local 627, as the bargaining representative of the employees of South Prairie or to extend the terms of Local 627's agreement with Kiewit to South Prairie's employees. The key issue is whether, for purposes of the National Labor Relations Act, Kiewit and South Prairie are separate employers, as determined by the Board, or a "single employer," as determined by the ALJ. We vacate the order and remand the case.

In deciding the key issue adversely to Local 627, the Board did not point to any of the findings of fact made by the ALJ with which it disagreed. Rather, it appears that the Board's disagreement with the conclusions drawn by the ALJ from these facts as they bear on the "single employer" issue constituted the basis for the Board's reversal.

Background

Respondents are wholly-owned operating subsidiaries of Peter Kiewit Sons', Inc. ("Kiewit, Inc.") All are Nebraska corporations. Kiewit and Kiewit, Inc., have their main offices in Omaha. South Prairie's main office is in Oklahoma City, although the members of its board of directors live in Omaha, have the

---

[1] [Continued]

(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 159(a) of this title."

same set of offices in Omaha as Kiewit, and share with Kiewit the use of Kiewit, Inc.'s telephone switchboard. Kiewit, Inc. performs accounting services for both Kiewit and South Prairie, and paychecks for both Kiewit and South Prairie are made out in Omaha on the same pay machine. Kiewit and South Prairie have separate accounting records, bank accounts, offices in Oklahoma, telephone numbers, supervisors, and office staffs. Neither has subcontracted work to the other. Each submits separate job bids. Each has a different dollar maximum fixed by the Oklahoma State Highway Department for work that it may undertake. Although the Board observed that each has separate officers, the ALJ noted that Kiewit's controller was South Prairie's president until March 1, 1972, that South Prairie's former vice president is Kiewit's executive vice president and a member of its board of directors, and that South Prairie's former secretary is Kiewit's secretary.

For many years, Kiewit was engaged in construction work, including heavy and highway construction in Oklahoma. J. N. Darveau was its long-time area manager for Oklahoma and represented it during the negotiations which culminated in the involved agreement with Local 627. This agreement was effective between July 1970 and June 1973 and included union shop and hiring hall provisions. It was at least the third in a series of agreements that had been in effect since 1960 covering heavy and highway construction. Local 627 has represented Kiewit's employees continuously since 1960.

Kiewit was the only highway contractor in Oklahoma to have a signed agreement with a union, and its wage costs were higher than those of its competi-

tors.[2] As stated by the Board, because of the disparity in costs from those of its competitors, Kiewit, Inc., decided [3] that South Prairie, a nonunion contractor engaged for many years in heavy and highway construction work outside Oklahoma, should be activated in Oklahoma to compete on equal terms with nonunion contractors.[4] On November 29, 1971, South

---

[2] Darveau testified that "our competitors were several cents or quite a little bit below us on the salaries they were paying, 50 cents or a dollar an hour than what we were paying." The ALJ found that employees on South Prairie's payroll are paid 50 cents to a dollar an hour less than those on Kiewit's payroll and do not receive the health and welfare benefits enjoyed by the latter.

[3] Under the circumstances of this case, we do not consider it material whether Kiewit, Inc., made the decision or whether Kiewit did so. The ALJ noted that Darveau had said he made the decision. Gerald Ellis, the Union's business agent, testified that Kiewit's attorney, Robert Doyle, told him that Kiewit was a "controlling company of South Prairie." (Doyle was present at the hearing before the ALJ, but did not testify.) Richard D. Coyne, vice president of Kiewit and a director of Kiewit, Inc., testified that Kiewit, Inc.'s board of directors made the decision because "if we were going to stay in business in the State it probably would have to be with a company that wasn't burdened by the union agreement." (Emphasis supplied.) The ALJ credited Coyne's testimony that South Prairie's board of directors sets South Prairie's labor policies and "they of course would get their instructions from Peter Kiewit Sons', Inc."

[4] The ALJ credited Ellis' testimony that during negotiations on the 1970-73 agreement Darveau told Local 627 that, if it did not get more contractors signed to the collective bargaining agreement, Kiewit was going to quit bidding work in Oklahoma and leave the state. However, Coyne testified that, when initially deciding to bring in South Prairie, Kiewit, Inc.'s board of directors "specifically decided that Kiewit would stay [in Oklahoma] and try to compete in some of the types of work in some of the areas where possibly they could be competitive." The ALJ concluded that the record failed preponderantly to show that, when it was initially decided to bring in South Prairie, it was intended that Kiewit cease doing business in Oklahoma.

Prairie filed an application to do business in Oklahoma, receiving its certificate of authority on December 10. In January or February of the following year it submitted a financial statement to the State Highway Department as required of contractors desiring to qualify for the Department's work, and on or about February 25, 1972, it began doing business as a highway contractor.

Darveau became South Prairie's president on March 1, 1972, at which time South Prairie took over the Oklahoma City office and an adjacent storage yard which had been occupied by Kiewit when Darveau was its area manager. (Kiewit changed its office to a construction trailer, but had moved to another office at the time of the hearing before the ALJ on October 11 and 12, 1972.) Myron Blume, an engineer estimator for Kiewit, became South Prairie's assistant secretary and assisted Darveau in the preparation of bids as he had while working for Kiewit. The material engineer and the secretary to Darveau while he was with Kiewit became employees of South Prairie in the same capacities, as did the superintendent in charge of the storage yard. By the time of the hearing before the ALJ, a majority of South Prairie's supervisory staff had been supervisors for Kiewit. Most of this group transferred without any break in employment; and normally they continued to serve in the same capacity, to receive the same salaries, and

to be covered by the same insurance plan. There was no hiring by Kiewit of supervisors who had worked for South Prairie.

The ALJ pointed to an instance when a Kiewit employee performed work for South Prairie but was paid by Kiewit. In June 1972, Gerald Kitchin, the truck mechanic foreman for Kiewit at "the Will Rogers Airport job," asked mechanic Kenneth Bolding, also employed by Kiewit at that job, about working in South Prairie's Oklahoma City yard. Bolding replied that he did not want to go because he would lose his health and welfare benefits, "that being a non-union company." A few days later, Kitchin told Bolding that "we have it worked out to where you will go ahead and be paid through this office at the airport." Bolding then reported to South Prairie's Oklahoma City yard where he worked for a month constructing a "steel inserter" with the assistance of South Prairie's equipment supervisor and a South Prairie mechanic. While working on this equipment, Bolding was paid at his old union rate by Kiewit checks. As a result of this activity, about $5,000 (representing labor and material) was transferred from Kiewit to South Prairie's account.[5]

The ALJ described another incident. When Kiewit had no more need for a "batch plant" crew at "the Nowata job," the concrete foreman told the crew to go to South Prairie's Tulsa paving job. Three members of the crew drove directly to the Tulsa paving job and began work at about the same rate of pay,

[5] The "steel inserter" was later used by Kiewit on "the Warner job," and after he left the South Prairie yard, Bolding went to work on Kiewit's Warner job.

without applying therefor and without any break in employment.

Between January 1 and November 23, 1971, the date South Prairie filed to do business in Oklahoma, Kiewit bid on thirty-five Oklahoma State Highway Department jobs and was low on four, the last of which was obtained on November 23.[6] Between February 25 and June 23, 1972, South Prairie bid on four State Highway Department jobs (representing five to ten percent of the work offered by the Department), and on June 20, 1972, it bid on four of the five jobs let by the Oklahoma Turnpike Authority. None of these bids was successful. Between November 23, 1971, and July 23, 1972, Kiewit submitted no bids for State Highway Department jobs.[7] Between July 23 and October 1, 1972, Kiewit bid on three Highway Department jobs, but received none. During the same period, South Prairie bid on three dif-

[6] The ALJ noted that of thirteen rival bidders, only one obtained contracts totaling more (by about twenty percent) than those obtained by Kiewit; that those obtained by Kiewit totaled about forty percent more than the third-ranking bidder; and that three of the four Kiewit contracts were among the five largest jobs for which Kiewit had bid. Such an achievement by Kiewit, the only highway contractor in Oklahoma to have a signed agreement with a union, indicates that the Board erred in stating that Kiewit was "not sufficiently competitive with nonunion contractors."

[7] Between May and July 5, 1972, Kiewit was not qualified to bid for State Highway or Turnpike Authority work because of late filing of its 1971 financial report. Moreover, because all of the stock of Kiewit and South Prairie is owned by a single entity, under Oklahoma law South Prairie's bidding on the Highway Department and Turnpike Authority jobs precluded Kiewit from bidding on the same jobs.

ferent Highway Department jobs and received one, which the ALJ termed "one of the largest in Highway Department history." At the time of the hearing on October 11 and 12, 1972, South Prairie had not yet begun work on this job (which the ALJ found could be performed by Kiewit), but during the time it had been in business in Oklahoma it had performed work on several Oklahoma jobs as a subcontractor.

Commencing in March 1972, Local 627's business agent, Ellis, complained to Kiewit's Coyne and South Prairie's Darveau that Kiewit had brought South Prairie into Oklahoma to start bidding on highway work. Coyne disclaimed knowledge "of any part of it," although he had actually participated in the decision of Kiewit, Inc.'s board of directors to bring South Prairie into Oklahoma. Ellis sought unsuccessfully to have Kiewit and South Prairie agree to apply the Union's agreement with Kiewit to South Prairie's work. On June 20, 1972, the day South Prairie bid on four Turnpike Authority jobs, Local 627 filed the charge that led to the proceedings below.

Guidelines for "Single Employer" Status

In *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965), the Supreme Court, in a per curiam opinion affirming a "single employer" holding below, said:

> the controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

The Court cited several NLRB decisions including one affirmed in *Sakrete of Northern California, Inc.* v. *NLRB*, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961, 85 S.Ct. 649, 13 L.Ed.2d 556 (1965). In *Sakrete*, the Ninth Circuit stated, at 907:

> even if the substantial evidence shows interrelationship of operations, centralized control of labor relations, or common management only at the executive or top level, we do not agree that this precludes application of the "single employer" concept.

It pointed out that these three criteria "deal not with power and authority, as such, but with its exercise," and that such criteria, "on any level, are considerations in addition to the factor of common ownership or financial control." [8]

Although the Supreme Court in *Radio Union*, *supra*, commented that the record in that case was more than adequate to show that all of the four "controlling criteria" were present, it does not appear that all four criteria must be present. In one of the NLRB cases cited, *Canton, Carp's, Inc.*, 125 N.L.R.B. 483 (1959), the Board observed that it had on several occasions made a finding of a single employer status in the absence of a common labor relations policy, and even when it had been affirmatively shown that each of two corporations held to be a single employer established its own labor relations policy. In another of the NLRB cases cited, *V.I.P. Radio, Inc.*, 128 N.L.R.B. 113 (1960), the Board found that there was little or no employee interchange; but 90 percent stock ownership of the second corporation, the same officers and

---

[8] In a later decision, *NLRB* v. *Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), the Ninth Circuit, citing *Sakrete*, said that no one of the four criteria is controlling.

directors, and centralized control of "general labor policy" and operations resulted in a "single employer" holding. In still another cited NLRB case, *Overton Markets, Inc.*, 142 N.L.R.B. 615 (1963), the Board noted, at 619, that the circumstances were not "characteristic of the arm's length relationship found among unintegrated companies." [9] Its conclusion that there was a "single employer" for purposes of the Act rested on consideration of "all the circumstances" of the case.

[1, 2] From the foregoing, we conclude that "single employer" status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present; that, in addition to the criterion of common ownership or financial control, the other criteria, whether or not they are present at the top level of management, are "controlling" indicia of the actual exercise of the power of common ownership or financial control; and that the standard for evaluating such exercise of power is whether, as a matter of substance, there is the "arm's length relationship found among unintegrated companies." [10]

---

[9] The "arm's length" test makes meaningful the Board's reference in *Canton, Carp's, Inc., supra* at 484, to "realities of commercial organization." It was applied by this court in *American Fed. of Television & Radio Artists* v. *NLRB*, 149 U.S.App.D.C. 272, 462 F.2d 887 (1972).

[10] Petitioner relies heavily on *NLRB* v. *Royal Oak Tool & Mach. Co.*, 320 F.2d 77 (6th Cir. 1963) in which the court said, at 81:

> It requires a greater degree of credulity than is possessed by this Court to accept the view that [the subsidiary's operating officers] could inaugurate or establish a labor policy . . . that did not meet with the absolute approval of the board of directors [of the parent company].

So too, we are persuaded that South Prairie's president, having decided or, at least, recommended that South Prairie be activated in Oklahoma, was not a free agent to alter South Prairie's nonunion policy.

Centralized Control of Labor Relations

[3] In its opinion, the Board stated that a "critical factor" in determining the "single employer" issue is the *degree* of common control of labor relations policies. Petitioner argues that such control follows from the fact that the parent company, Kiewit, Inc., and its wholly owned subsidiary, Kiewit, decided that South Prairie would operate on a nonunion basis in Oklahoma. On the other hand, respondent NLRB's position is that this does not follow, because, "within that framework" (*i.e.* operating nonunion), South Prairie's labor policy determinations are set by South Prairie's president; whereas Kiewit's labor policies are determined by an official of Kiewit, Inc.

Although, as pointed out above, centralized control of labor relations is one of the "controlling criteria," it is not "critical" in the sense of being the sine qua non of "single employer" status. *Canton, Carp's, Inc., supra.* The degree to which such control is present (or absent) is, of course, one of the circumstances upon which "single employer" status depends. The Board did not say that there was no degree or no substantial degree of centralized control of labor relations, although this might be implied from its comment about labor policy determinations being set by South Prairie's president within the "framework" of a nonunion policy. In any event, exercise of control

by the decision imposing such a "framework" on South Prairie's Oklahoma operations constitutes a very substantial qualitative degree of centralized control of labor relations. It is the touchstone for day-to-day decisions by South Prairie's president respecting wages, hours, health and welfare benefits, working conditions, and other vital matters that otherwise would be decided by collective bargaining.[11] Moreover, we are satisfied that such exercise of control at the top level of management would not be found in the arm's length relationship existing among unintegrated companies.

The "Single Employer" Issue

[4, 5] The presence of a very substantial qualitative degree of centralized control of labor relations does not, however, determine the key "Single Employer" issue. As we have pointed out above, all the circumstances of the case must be considered. In its opinion, the Board stated that it had considered the

[11] With the Wagner Act (Pub.L.No. 158, 49 Stat. 449), Congress in 1935 declared the national labor policy to be the encouragement of collective bargaining and removed legal obstacles to organization to clear the way for effective union security devices. In 1959, the Labor-Management Reporting and Disclosure Act (Pub.L.No. 86-257, 73 Stat. 519, 545) added section 8(f) to the NLRA to exempt the construction industry from some of the requirements obtaining in other industries—for example, a union need not be the certified representative of a majority of the employees. C. Morris, *The Developing Labor Law* 609 (BNA 1971). While an employer is legally entitled to avoid bargaining with a union if it has not been chosen by the employees, exercise of control over labor relations by deciding that South Prairie would follow a nonunion policy cannot be reasonably regarded as other than a substantial qualitative degree of control.

record and the ALJ's decision, which might imply that it had considered all the circumstances of the case in accordance with the standard recited in *Overton Markets, supra.* The Board recognized that Kiewit and South Prairie are wholly owned subsidiaries of Kiewit, Inc., and are engaged in related businesses. It did not refer to the criteria of interrelation of operations and common management,[12] although it commented that Kiewit and South Prairie have different officers, separate accounting records, bank accounts, offices in Oklahoma, telephone numbers, supervisors, and office staffs; also, that neither has subcontracted work to the other, and that each submits separate job bids (as required by Oklahoma law). Without more, such facts might tend to indicate an absence of interrelation of operations or common management. However, as related above, the record discloses much more: the same set of offices in Omaha for the boards of directors of the two companies; the interchange of key personnel [13] between the two companies (Kiewit's Oklahoma area manager, Darveau, who either decided or recommended that South Prairie be activated in Oklahoma, to South Prairie as president; South Prairie's president to Kiewit as controller; South Prairie's vice president to Kiewit as executive vice president and member of its board of directors; South

[12] In its brief, the Board fully recognizes the criteria specified by the Supreme Court in *Radio Union, supra.*

[13] As noted by the ALJ, rank-and-file employees are hired for a particular job only, so "[t]here is little evidence of transfers of such employees between Peter Kiewit's and South Prairie's payroll." *See Local 150, Int'l Union of Op. Eng.* v. *NLRB,* 156 U.S.App.D.C. 294, 297, 480 F.2d 1186, 1189 (1973).

Prairie's secretary to Kiewit as secretary; Darveau's engineer estimator at Kiewit to South Prarie as assistant secretary to continue assisting Darveau in the preparation of bids; the material engineer and the secretary to Darveau at Kiewit to South Prairie in the same capacities; the storage yard superintendent at Kiewit to South Prairie in the same position; and transfers of supervisors from Kiewit to South Prairie to the extent that a majority of the latter's supervisory staff was composed of such transferees); the payment of compensation by Kiewit to a mechanic who worked for South Prairie in South Prairie's Oklahoma City yard; the circumstances of the shift of the batch plant crew from Kiewit's Nowata job to South Prairie's Tulsa paving job; and the takeover by South Prairie of Kiewit's Oklahoma City office and storage yard when Darveau became South Prairie's president. These facts and circumstances were not even commented upon by the Board,[14] and they evidence a substantial qualitative degree of interrelation of operations and common management—one that we are satisfied would not be found in the arm's length relationship existing among unintegrated companies.

[6] In view of the foregoing and considering all the circumstances of this case, we hold that the

---

[14] What this court said in *Greater Boston Television Corp.* v. *F.C.C.*, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851, *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1951), is worth repeating here:

> The function of the court is to assure that the agency has given *reasoned consideration* to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and *identify the significance of the crucial* facts . . . .

[Footnote omitted and emphasis supplied.]

Board's finding that respondents Kiewit and South Prairie are separate employers for purposes of the National Labor Relations Act is not warranted by the record. *See NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1170 (1944).

Section 8(a)(1) and (5) Issue

The Board premised its determination of this issue on its erroneous finding that Kiewit and South Prairie are separate employers. However, in the course of its opinion, it declared:

> It is not uncommon in the construction industry for the same interests to have two separate organizations, one to handle contracts performed under union conditions and the other under nonunion conditions.

The Board noted that it has refused to include the employees of a nonunion company in the same bargaining unit with those of a union company controlled by the same interests, citing *Central New Mexico Chapter, National Electrical Contractors Association*, 152 N.L.R.B. 1604 (1965). There the petitioner, a local of the International Brotherhood of Electrical Workers, contended that Gamblin Electric Co. and New Mexico Electric Construction Co. ("NMECO") constituted a single employer for unit purposes. Gamblin (union) was engaged in commercial and industrial electrical contracting work; NMECO (nonunion) in residential contracting work. The Board said there was ample evidence in the record to support the conclusion that the two corporations constituted a single employer under the Act. However, it held that NMECO did not have to be included in a multi-employer unit composed of mem-

bers of the Chapter (including Gamblin) which had signed a letter of assent to the Chapter's representation in bargaining activities, saying:

> In the circumstances of the case, and particularly in view of the separate supervision of employees of the two firms, their separate location, the lack of employee interchange, absence of evidence of functional integration, and the fact that labor policies of NMECO, a residential contractor, are based on its own needs and are not dependent on those of Gamblin, a commercial and industrial contractor, show that employees of the two firms do not have the same community of interest.

Thus, although the Board found sufficient evidence to support a holding of "single employer" status, it declined to place the employees of a commercial and industrial contracting firm in the same unit with the employees of a residential contracting firm, because the employees of the two firms did not have the same "community of interest." Here Kiewit and South Prairie are engaged in the same class of construction work in the same locality; and the Board gave no indication that, if a "single employer" status obtained, it would have disagreed with the ALJ's conclusion that Kiewit and South Prairie employees constitute an appropriate unit for collective bargaining purposes.

The Board also noted that it has refused to require a nonunion company to recognize the bargaining representative of a union company's employees or to apply the collective bargaining contract with the latter to the former. It cited *Gerace Construction, Inc.*, 193 N.L.R.B. 645 (1971), in which it reversed the

trial examiner's determination that Gerace (union) and Helger Construction Co. (non-union), which had common stockholders and directors, functioned as a single enterprise and constituted a "single employer." Both companies submitted separate job bids and normally did not bid on the same jobs; also, there was no showing that Gerace lost business to Helger or that any Gerace employee lost work he otherwise would have had. However, the Board found that Helger's contracts amounted to less than $50,000, while Gerace's were seldom less than $250,000; further, that the principal stockholder in Gerace was no longer a stockholder and director in Helger, having sold his stock to one Sweebe, the principal management officer of Helger, and that *actual control* of Helger was in Sweebe. The Board also cited *Frank N. Smith Associates, Inc.*, 194 N.L.R.B. 212 (1971). That case involved two corporations, Smith Associates (union), which was engaged in construction and repair of commercial and industrial buildings, and Kuka (nonunion), which was engaged in construction of commercial, industrial, and residential buildings. The record showed that Smith Associates did not own and/or control Kuka, and Kuka was not part of Smith Associates as a wholly or partially owned subsidiary. The trial examiner, whose decision was affirmed and adopted by the Board, concluded that Kuka operated "in an area of business not available to Associates" and determined that there would be an inappropriate unit if Kuka's employees were considered to be Associates' employees. It is evident that the facts in these cases differ critically from the facts of the case before us. In *Gerace*, the Board found that actual control of the nonunion company was in its principal management officer. In

Smith, there was no wholly or partially owned subsidiary, and one company operated in an area of business not available to the other.

[7] Respondents argue that there is no evidence that Kiewit's employees actually lost work because of South Prairie's entrance into Oklahoma and that, accordingly, "there is no basis here to support the conclusion that South Prairie's presence in Oklahoma was detrimental to Kiewit's business or to the earnings of Kiewit's Union employees"; further, that petitioner union is "attempting to seize upon common corporate ownership to achieve initial representation without engaging in an organization campaign." Although we recognize that the central purpose of the "single employer" principle is to make collective bargaining agreements legally binding, we do not agree that it is necessary for petitioner to have waited for hardship to occur—to show that Kiewit's employees actually lost work or that there were other detrimental effects—in order for the "single employer" principle to apply.[15] What is necessary is a showing of a reasonable likelihood of such occurrences. *See Local 1912, International Association of Machinists* v. *United States Potash Co.*, 270 F.2d 496, 498 (10th Cir. 1959), *cert. denied*, 363 U.S. 845, 80 S.Ct. 1609, 4 L.Ed.2d 1728 (1960).

[8] Commencing the day after South Prairie filed to do business in Oklahoma on November 23, 1971, and running to July 23, 1972, Kiewit submitted no bids for Oklahoma State Highway Department jobs;

[15] "For in the labor field, as in few others, time is crucially important in obtaining relief." *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 430, 87 S.Ct. 559, 565, 17 L.Ed.2d 486 (1967).

whereas between February 25 and June 23, 1972, South Prairie bid on four. South Prairie's bidding on the four Turnpike Authority jobs precluded Kiewit from doing so, and Kiewit's late filing of its 1971 financial report precluded it from bidding on the fifth Turnpike Authority job. Although Kiewit bid (unsuccessfully) on three Highway Department jobs between July 23 and October 1972 (after petitioner union filed the charge on June 20, 1972), South Prairie obtained "one of the largest in Highway Department history." Meanwhile, the four jobs Kiewit had obtained between January 1 and November 23, 1971, were in the course of completion. When South Prairie began doing business in Oklahoma, there were transfers of key personnel from Kiewit to South Prairie, and, as time went on, supervisors were transferred from Kiewit to South Prairie to such an extent that a majority of the latter's supervisory staff consisted of such transferees. In view of such developments, we conclude that a reasonable likelihood that Kiewit's business would decline and that Kiewit's employees would lose work has been established, so that application of the "single employer" principle would serve to protect the Union's agreement with Kiewit and to prevent Kiewit's employees from losing "the fruits of the contract." *Local 1912, International Association of Machinists* v. *United States Potash Co., supra* at 498.[16]

Accordingly, we hold that the Board erred in finding that Kiewit and South Prairie had no obligation

[16] Respondent South Prairie cites *B & B Industries*, 162 N.L.R.B. 832 (1967), where the Board found no violation in the refusal to apply an agreement signed by one company to another company, the two being jointly owned. At the time

to recognize Local 627 as the bargaining representative of South Prairie's employees or to extend the terms of the Union's agreement with Kiewit to South Prairie's employees.

The order of the Board is vacated and the case is remanded for issuance and enforcement of an appropriate order against respondents Kiewit and South Prairie.

TAMM, *Circuit Judge* (dissenting):

I must dissent from this needless vacation of the Board's order, which has resulted from a factual disagreement between a majority of this division and the expert agency charged with principal responsibility for administering our labor policy.

There is no dispute in this case regarding the applicable legal standard. To determine whether two nominally separate employers are, in reality, a "single employer" for purposes of the Act, (1) the interrelationship of operations, (2) centralized control of labor relations, (3) common management and (4)

---

the contract was signed, the second company was engaged in the same class of work in the same locality as the signatory company and shared the same office space, clerical personnel, and post office box; also a number of employees had worked for both companies at different times. The Board found that the General Counsel had not proved by a preponderance of the evidence that the agreement was intended to cover the nonsignatory company. Such facts readily distinguish that case from the one before us, where it clearly was not contemplated by the parties at the time the involved agreement was negotiated that South Prairie would be brought into Oklahoma under circumstances that would be likely to jeopardize the rights of Kiewit's employees to receive "the fruits of the contract."

common ownership must all be considered. *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965). Consequently, the controversy is simply over the application of those indicia of control to this factual context.

Thus viewed, it becomes apparent that the majority simply has substituted its view of the facts for that of the agency to whom Congress has assigned the task of developing expertise over this type of factual affair. Several references to the majority opinion will suffice to demonstrate this phenomenum.

For example, while discussing the factors the Board found significant, the majority delves into the record itself and delineates the facts *it* finds significant to reach the opposite conclusion. *See* —— U.S. App.D.C. p. ——, 518 F.2d p. 1046. The majority attempts to paint a picture of a substantial shifting of personnel between the companies, despite the fact that even the Administrative Law Judge found "little evidence of transfers of such [i. e. rank & file] employees between [Kiewit's] and South Prairie's payroll." Ante, —— U.S.App.D.C. p. ——, 518 F.2d p. 1047. Finally, the majority claims that South Prairie's bidding on four Turnpike Authority jobs between February and June 1972 precluded Kiewit from doing so; in fact, Kiewit was working near full capacity during this period. This is not a case where a new non-union company is "spun off" to draw away the union company's business; before entering Oklahoma, South Prairie had been in existence for twenty-eight years as non-union company.

Were we deciding this case *de novo*, I might agree with the majority. However, finding the Board's order supported by substantial evidence, I respectfully dissent.

APPENDIX B

MJK
D—7972
Oklahoma City, Okla.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 16—CA—4826

PETER KIEWIT SONS' CO. AND
SOUTH PRAIRIE CONSTRUCTION CO.

AND

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 627, AFL-CIO

DECISION AND ORDER

On January 31, 1973, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent Peter Kiewit Sons' Co. filed exceptions, Respondent South Prairie Construction Co. filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and

conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondent South Prairie Construction Co., herein called South Prairie, and Respondent Peter Kiewit Sons' Co., herein called Kiewit, are separate corporate subsidiaries of Peter Kiewit Sons', Inc., herein called Inc. For a substantial number of years, Kiewit has been engaged in the construction activity, including highway construction, in Oklahoma. It was the only highway contractor in Oklahoma to have signed a union contract and its wage costs were higher than those of its competitors. Because of this disparity in costs, which made Kiewit not sufficiently competitive with nonunion contractors, Inc. determined that South Prairie, which was a nonunion contractor engaged in construction work outside Oklahoma, should be activated in Oklahoma to compete on equal terms with nonunion contractors. About March 1, 1972, South Prairie began doing business in Oklahoma as a highway contractor. South Prairie has never signed any collective-bargaining contract with the Union, nor have its employees ever selected the Union as their bargaining representative. Nevertheless, the Administrative Law Judge found that by refusing to apply Kiewit's contract with the Union to South Prairie's employees, Respondents violated Section 8(a)(5) and (1) of the Act.

It is not uncommon in the construction industry for the same interests to have two separate organizations, one to handle contracts performed under union conditions and the other under nonunion conditions. The Board has recognized this fact by refusing to include the employees of a nonunion company in the same bargaining unit with those of a

union company controlled by the same interests,[1] and by refusing to require the nonunion company to recognize the bargaining representative of the union company's employees or to apply the collective-bargaining contract with the latter to its own employees.[2]

A company which has not agreed to be bound by the collective-bargaining contract of another company may nevertheless be held to that contract if it is an *alter ego* of the signing company of if it may be said to constitute a single employer with that company. There is no contention that South Prairie is an *alter ego* for Kiewit. South Prairie's potential liability under the Kiewit contract therefore must turn on the issue of whether the two companies constitute a single employer for collective-bargaining purposes. In making this determination, consideration is given to the fact that the two companies are wholly owned subsidiaries of Inc. and are engaged in related businesses. However, these factors are not controlling. As recently stated in the *Gerace Construction* case:[3]

> A critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control of labor relations policies. Thus, the Board has found common ownership not determinative where requisite common control was not shown, and the Board has held with court approval that

[1] *Central New Mexico Chapter, National Electrical Contractors Association, Inc.*, 152 NLRB 1604.

[2] *Gerace Construction, Inc.*, 193 NLRB 645; *Frank N. Smith Assoicates, Inc.*, 194 NLRB 212.

[3] *Gerace Construction, Inc., supra*, 645.

> such common control must be actual or active, as distinguished from potential control. [Citations omitted.]

In the present case, South Prairie and Kiewit are separate legal entities which have operated as separate enterprises for a great many years preceding the present dispute. They have separate accounting records, separate bank accounts, and different officers. They have separate offices in Oklahoma with separate telephone numbers, and separate Oklahoma area supervisors with separate supporting office staffs. Neither has ever subcontracted work to the other. Each company submits separate job bids, although they do not bid against each other. Each company has a different dollar maximum fixed by the Oklahoma State Highway Department for work which it may undertake. Employees on Kiewit's payroll receive the wages and benefits called for by the union contract; employees of South Prairie receive lower wages and no benefits. Although Inc. determined that South Prairie would operate on a nonunion basis, South Prairie's labor policy determinations within that framework are set by South Prairie's president, whereas Kiewit's labor policies are determined by an official of Inc.

In view of the foregoing, we find that South Prairie and Kiewit are separate employers under the Act and that the employees of each constitute a separate bargaining unit.[4] Accordingly, we further

[4] *Gerace Construction, Inc.*, 193 NLRB 645; *Frank N. Smith Associates, Inc.*, 194 NLRB 212. The Administrative Law Judge's attempt to distinguish these cases is not persuasive. The decision in *Gerace* did not turn on the date when the bargaining agreement was executed with respect to the date

find that Respondents had no obligation to recognize the Union as the bargaining representative of South Prairie's employees or extend the terms of the Union's agreement with Kiewit to South Prairie's employees. For this reason, we shall dismiss the complaint.

---

on which the nonunion corporation was formed, but on the critical fact that despite the formation of the nonunion corporation by the controlling stockholder of the union corporation, actual control of the labor relations of the former, as distinguished from potential control, was vested in the nonunion corporation's own officers. On this basis, the Board found that the two corporations constitute separate employers. Similarly, in *Smith Associates* the nonunion corporation was formed by the persons in control of the union corporation "in order to negotiate for or bid on jobs as an open shop." Despite this frank admission of the purpose in the formation of the nonunion corporation, the Board adopted the Trial Examiner's finding that the nonunion corporation was a separate employer which was not required to adhere to the terms of the collective-bargaining contracts of its sister corporation.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C.

EDWARD B. MILLER, Chairman

HOWARD JENKINS, JR., Member

RALPH E. KENNEDY, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

DECISION

Statement of the Case

NANCY M. SHERMAN, Administrative Law Judge: This proceeding, heard at Oklahoma City, Oklahoma, on October 11 and 12, 1972, pursuant to a charge filed on June 20, 1972, and a complaint issued on September 6, 1972, presents the question of whether Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by their refusal to apply to employees on the payroll of Respondent South Prairie Construction Co. (herein "South Prairie") the terms and conditions of a contract executed by Respondent Peter Kiewit Sons' Co. (herein "Peter Kiewit") and the Charging Party (herein "Local 627").

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, Peter Kiewit, and South Prairie, I make the following:

Findings of Fact

I. Jurisdiction

Respondents are Nebraska corporations which are engaged in the general construction business throughout the United States and, more specifically, in the construction of highways in the State of Oklahoma. During the 12-month period preceding the issuance of the complaint, a representative period, each Respondent made purchases valued in excess of $50,000 from outside Oklahoma which it caused to be shipped directly to its operations in Oklahoma. I find that, as Respondents concede, Respondents are each engaged

in commerce within the meaning of the Act, and that exercising jurisdiction over the operations of each will effectuate the policies of the Act.

International Union of Operating Engineers, Local No. 627, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Background*

At all times material hereto, Peter Kiewit has been an employer engaged primarily in the building and construction industry within the meaning of Section 8(f) of the Act,[1] and Local 627 has been a labor organization of which building and construction employees are members within the meaning of Section 8(f). Local 627 has represented Peter Kiewit's employees continuously since 1960, 12 years before the alleged unfair labor practices herein.[2] Robert H. Doyle (Peter Kiewit's counsel at the hearing) and Gerald Ellis (Local 627's business representative, who represented it at the hearing) stated on the record that the initial agreement had been negotiated under Section 8(f). However, at all times since 1960, including the time during which the parties negotiated

---

[1] This provision is quoted and discussed at length *infra* Part II E 1a.

[2] This finding is based on the uncontradicted and credited testimony of Gerald Ellis, Local 627's business manager, on redirect examination. His testimony in this respect is to some extent corroborated by the testimony of J. M. Darveau (Peter Kiewit's area manager between 1960 and March 1972), and is consistent with record statements by Peter Kiewit's attorney, Robert H. Doyle.

and executed the most recent agreement (effective by its terms between July 1970 and June 1973), Peter Kiewit has continuously had on its payroll employees represented by Local 627. The testimony fails to show the number of bargaining agreements to which Peter Kiewit and Local 627 have been parties since 1960; [3] but it establishes that as to highway work, the kind of work involved here, there were at least two prior to the execution of the 1970-1973 agreement.[4] Peter Kiewit attempted to comply with at least the agreement preceding the 1970-1973 agreement, and also the latter agreement with respect to employees on its payroll. Both the 1970 agreement and its immediate predecessors included a provision requiring employees to join or remain members of Local 627 as a condition of keeping their jobs. Local 627 never advised Peter Kiewit that any employees had failed to comply with such provisions and should be discharged for that reason.

In May or June of 1970, J. M. Darveau, who was then Peter Kiewit's area manager and was representing it during the negotiations which culminated in the 1970-1973 contract, told Local 627 that if it did not get more contractors signed to the collective-bargaining agreement, Peter Kiewit was going to quit bid-

[3] Doyle and Ellis stated on the record that since the execution of the original agreement, the parties have periodically renegotiated their agreements.

[4] Richard L. Coyne, Peter Kiewit's vice president, testified that "originally, as I remember years ago, the agreement we had initially covered only highway work." Ellis testified that the 1970-1973 agreement, which covers both highway construction work and heavy construction work, replaced two expiring agreements covering such work separately.

ding work in Oklahoma and leave the State.[5] Darveau had made similar remarks to Ellis on previous occasions. Darveau testified that if Ellis did not organize other contractors, Peter Kiewit would feel forced to get out of Oklahoma because it would be paying higher wages than its competitors, and that he wanted Ellis to bring Peter Kiewit's competitors up to Peter Kiewit's wage scale.

B. *South Prairie starts to bid for highway construction work in Oklahoma*

Darveau (who was Peter Kiewit's area manager between 1960 and March 1, 1972) testified that so far as he knew, Peter Kiewit operates strictly Union jobs. He further testified that so far as he knew, Peter Kiewit was the only Union highway contractor in Oklahoma, and that it was difficult for Peter Kiewit to bid against non-Union companies. On a date not fixed by the record, Darveau complained to Peter Kiewit's board of directors that because the wages and benefits required by Peter Kiewit's collective-bargaining agreement were higher than those paid by competitors, Peter Kiewit could not competitively bid on highway contracts in Oklahoma. Darveau suggested to Peter Kiewit Sons', Inc. (sometimes referred to herein and in the record as "Inc."), which owns all the stock of Respondent Peter Kiewit Sons' Co., that a non-Union company should be brought in.

Thereafter the matter was discussed by Inc.'s board of directors, who decided to accept Darveau's suggestion to send in a non-Union company. Richard L.

[5] This finding is based on Ellis' credited testimony. On the basis of the witnesses' demeanor, I do not credit Darveau's testimony that he referred only to highway contractors.

Coyne, who is a vice president of Peter Kiewit and a director of Inc., credibly testified that Inc.'s board of directors made this decision because:

> . . . we felt that Peter Kiewit Sons', Inc., Co. with the union agreement and the wages and conditions, was unable to continue to compete successfully in the State and that if we were going to stay in business in the State it probably would have to be with a company that wasn't burdened by the union agreement. . . . We had to find a company that could come into the State and not have the burdens of the contract and get the work.

The company so selected was Respondent South Prairie, a Nebraska corporation which, like Respondent Peter Kiewit, is a wholly owned subsidiary of Inc. At that time South Prairie, which had been incorporated in 1944 under a different name, was performing essentially the same kind of work (heavy and highway construction) as Peter Kiewit in several other States, but was not performing any work in Oklahoma. Darveau testified that so far as he knew, South Prairie operated and operates strictly non-Union jobs. When asked why South Prairie was activated in Oklahoma, Darveau testified, "We activated it to be competitive with our competitors." He further testified that when Inc. activated South Prairie it was designed to compete against the non-Union highway contractors and that the motivating factor that brought South Prairie into Oklahoma was that Peter Kiewit allegedly could not competitively bid on contracts in Oklahoma; "our competitors were several cents or quite a little bit below us on the salaries they were paying, 50 cents or a dollar an hour than what we were paying."

Between January 1, 1971 and November 23, 1971,[6] Peter Kiewit bid on 35 jobs for the Oklahoma State Highway Department,[7] and was the low bidder on 4, the last of which it obtained on November 23, 1971.[8] Pursuant to an application dated November 29, 1971, for a "Certification of Domestication," on December 10, 1971, South Prairie received a certificate of authority from the State of Oklahoma to transact business in that State. In January or February 1972, South Prairie submitted to the Oklahoma State Highway Department the financial statement required of

---

[6] The various Highway Department jobs bid for and obtained by Respondents during 1971 and 1972 are set forth in Peter Kiewit's Exhibit 1 and in South Prairie's Exhibit 1. It is not clear from these exhibits whether the listed dates are the dates on which bids were submitted or the somewhat later dates on which the contracts were let. As the difference does not appear significant, I have assumed in my findings that these dates coincide.

Peter Kiewit's Exhibit 1 contains an obvious error in connection with the Washita County job on which Cornell was assertedly the low bidder. According to the exhibit, Peter Kiewit's bid was less than half of Cornell's. My findings assume that Cornell was the low bidder and that the two bids were interchanged.

[7] During 1971, Peter Kiewit bid on about 10 percent of the jobs that the Highway Department had.

[8] Three of these four were among the five biggest jobs for which it bid. Of the remaining 34 jobs, Empire was the low bidder on 11; H. D. Youngman on 4; Evans S. Throop and McConnell on 3 each; JOB, Cornell, Chas. Cohen, and Broce on 2 each; and 5 other firms on 1 each. Or these 13 rival bidders, only 1 (Empire) obtained contracts totalling more (by about 20 percent) than those obtained by Peter Kiewit. Peter Kiewit obtained contracts totalling about 40 percent more than the third ranking bidder (Youngman).

contractors who wish to qualify for Oklahoma State Highway Department work.[9] Thereafter, South Prairie bid on 5 to 10 percent of the work offered by that Department. Thus, between February 25, 1972, and June 23, 1972, South Prairie bid on 4 jobs with the Oklahoma State Highway Department, but obtained none of them. On June 20, 1972, South Prairie submitted bids on 4 of the 5 jobs let that day by the Oklahoma Turnpike Authority, amounting to 4 or 5 million dollars, but obtained none of them. Because all the stock in both Peter Kiewit and South Prairie is owned by a single entity, under Oklahoma law South Prairie's action in bidding on these 8 jobs foreclosed Peter Kiewit from doing so. Moreover, Peter Kiewit in effect disqualified itself from bidding on any Highway Department or Turnpike Authority contracts between May 1972 and July 5, 1972.[10]

---

[9] As a practical matter, a contractor who has been accepted by the Oklahoma State Highway Department as eligible to bid on its contracts will also be accepted by the Oklahoma Turnpike Authority as eligible to bid on contracts let by it. However, a contractor's eligibility to bid on Federal or private highway contracts in Oklahoma is not affected by his status as a bidder with the Oklahoma State Highway Department.

[10] Because Peter Kiewit was late in filing its 1971 financial report by a due date extended to April 30, 1972, and failed to request a further extension, between May 1972 and July 5, 1972, it was not qualified to bid for Oklahoma State Highway Department or Turnpike Authority work. The General Counsel suggests that Peter Kiewit's action in filing this report on July 5, 1972, was prompted by the June 20, 1972, filing of the charge herein. However, Peter Kiewit had filed its report late on other occasions, although the record fails to show whether it had ever previously been dropped from the prequalified-bidders' list upon failure to obtain additional extensions. Moreover, a contractor which has been dropped

Peter Kiewit submitted no bids for State Highway Department work between South Prairie's application for authority to do business in Oklahoma (filed on November 29, 1971) and July 23, 1972. Between that date and October 1, 1972, it bid on 3 Highway Department jobs, but received none of them (*infra* fn. 46). Between these same dates, South Prairie also bid on 3 Highway Department jobs. South Prairie was the successful bidder on one of these jobs, which is one of the largest in Highway Department history. Peter Kiewit could perform this job and was qualified to do it. At the time of the hearing, South Prairie had not yet begun work on this job. However, prior to the hearing it had performed work on several Oklahoma highway jobs as a subcontractor (see *infra* part II D 3).

C. *Respondents' refusal to apply to the employees on South Prarie's payroll the bargaining agreement executed by Local 627 and Peter Kiewit*

In March 1972, Gerald Ellis (Local 627's business agent) complained to Richard L. Coyne (a vice president of Peter Kiewit and a director of Inc.) that

---

from the prequalified-bidders' list for failure to file a current financial statement can at any time requalify itself to bid for Oklahoma State Highway Department and Turnpike Authority jobs simply by filing a statement, is not precluded from performing such contracts already let to it, and has not been affected in its ability to obtain certain other work in Oklahoma (*supra* fn. 9). Further, Peter Kiewit actually submitted a bid to the Highway Department later in the same month in which it filed the report—its first bid since it had been dropped from the prequalified-bidders' list—and I see no reason to infer that this bid was a sham (*infra* fn. 46). In view of this evidence, I decline to draw the inference suggested by the General Counsel.

Peter Kiewit had brought South Prairie into Oklahoma to start bidding on highway work, and that he "believed" that South Prairie was "controlled by Peter Kiewit Sons' Company." Ellis expressed the view that such action was "circumventing of our collective bargaining agreement." Coyne replied that he "wasn't aware of any part of it. He wasn't aware of South Prairie." [11] Coyne stated that he would "check into it" and call Ellis back. However Coyne never did call Ellis back. Ellis also made a number of attempts to telephone attorney Robert Doyle, who had participated in negotiating and had signed the contract executed by Peter Kiewit and Local 627, and finally reached him in Omaha on March 29. Doyle stated that he was no longer labor relations man for Peter Kiewit in Oklahoma.[12] Doyle stated that Local 627 would have to talk to the superintendents with any problems. Doyle told Ellis that he was aware of South Prairie. Ellis told Doyle that he thought Peter Kiewit controlled South Prairie. Doyle did not deny this, but stated that he was not doing any labor relations for Peter Kiewit in Oklahoma at that time.

That same evening, Ellis telephoned Darveau, who had been Peter Kiewit's Oklahoma area manager until March 1 but then became South Prairie's president. Ellis complained to Darveau that Peter Kiewit was attempting to circumvent the collective-bargaining agreement. Ellis asked Darveau what his capacity was with South Prairie; he replied that he

---

[11] As previously noted, Coyne had admittedly participated in the decision of Inc's board of directors to bring South Prairie into Oklahoma.

[12] Doyle represented Peter Kiewit at the hearing herein, and filed a brief with me on its behalf.

was the "head man" and that "Kiewit would continue to work union on their union jobs. But South Prairie had elected to be non-union and do their work nonunion." Ellis asked whether Darveau was "the area manager like he had been for Kiewit for the past eleven or twelve years;" Darveau stated in the affirmative that he was the area manager. Ellis asked Darveau to recognize Local 627, and to cover the South Prairie work with the Peter Kiewit bargaining agreement. Ellis also asked "what our problem was." Darveau replied that "we didn't have any problem." Ellis asked whether it was the wages. Darveau replied no, it was not the wages. Ellis asked "had we been guilty of some action that we weren't aware of that should be brought to our people's attention?" Darveau said no, and repeated several times that "South Prairie had elected to be non-union." Ellis made no claim that a majority of operating engineers on South Prairie's payroll wanted Local 627 to represent them.

On April 18, 1972, Ellis chanced to encounter Doyle in a Washington, D.C., hotel lobby. At Ellis' request for a discussion of the Oklahoma situation involving Peter Kiewit and South Prairie, the two men met later that afternoon. At this meeting, Doyle admitted that Peter Kiewit was a "controlling company of South Prairie," but stated that South Prairie was "going to work non-union." When Ellis asked why, Doyle replied that "he didn't make those decisions and . . . he wasn't in the labor relations in Oklahoma." [13]

---

[13] My findings as to the conversations between Ellis and Doyle are based on Ellis' uncontradicted and credited testimony. Doyle appeared at the hearing on Peter Kiewit's behalf, but did not testify.

On June 16, 1972, Ellis directed the following letter to Doyle (at Peter Kiewit's Omaha office) and Darveau (as "Oklahoma Area Manager, South Prairie Construction Company," in Oklahoma City):

> As you know, Local 627 of the International Union of Operating Engineers has had a Collective Bargaining Agreement with Peter Kiewit Sons' Co., for their highway and related construction work in Oklahoma and has a current agreement providing for wages, hours and conditions of employment for the Company's operating engineer employees.
>
> As you know also, South Prairie Construction Co. of Nebraska (formerly Cunningham-Kiewit Co.) recently domesticated in Oklahoma and started bidding and construction highway and related construction [sic].
>
> We have talked to Dick Coyne, General Counsel of Peter Kiewit Sons' Co., about this matter who told me he would call me back on the situation.
>
> My telephone conversation with Mr. Coyne was several weeks ago. He has not called me back to date.
>
> I have talked to Mr. Robert Doyle, Labor Relations Attorney for Kiewit, who informed me that he does not handle Oklahoma Labor Relations for Kiewit.
>
> I have talked to Joe Darveau who was Area Manager for Kiewit in Oklahoma for the past several years. He informed me that he is now area Manager for South Prairie Construction Co. on their highway work in Oklahoma. I ask [sic] him to recognize the Peter Kiewit Sons' Company and Operating Engineers, Local 627, Highway Agreement which he refused.
>
> We respectfully submit that there is considerable indicia to indicate to our Local Union that the above two firms are one employer within the meaning of Labor Management Relations Act so far as the highway and related construction work in Oklahoma are concerned.
>
> Since we have had no response to our request to make the South Prairie work come under the collective agreement or to bargain about the matter, we have no alternative except to institute action(s) under the applicable Labor Statutes.
>
> We stand ready to meet with you as requested earlier. We have no alternative with the facts known to us except to take the position that the South Prairie Highway Construction work in Oklahoma is covered by the Peter Kiewit Sons' Co. and Operating Engineers Collective bargaining agreement.

Ellis received no response to this letter. Four days after he sent it, on June 20, Local 627 filed the charge which gave rise to the instant proceeding. On the same date, O. W. Clark, who is the International Representative of Local 627's parent International, asked Darveau to sign an agreement for South Prairie on Oklahoma highway work. Darveau replied that he would not sign a contract, and that he intended to run South Prairie non-Union in the State of Oklahoma.

D. *The Relationship between Peter Kiewit and South Prairie*

1. Respondents' ownership and officers

As previously noted, all the stock in both Peter Kiewit and South Prairie is owned by Inc. Respondents had no common officers or directors at the time of the hearing in October 1972, but William H. Taylor—whom Darveau replaced on March 1, 1972, as South Prairie's president, and who was a director of South Prairie as late as November 29, 1971—is Peter Kiewit's controller. Moreover, as late as January 25, 1971, South Prairie's vice president was Walter Scott, Jr. (who is Peter Kiewit's executive vice president and a member of its board of directors), and South Prairie's secretary was James L. Koley, who is Peter Kiewit's secretary. South Prairie's board of directors live in Omaha, Nebraska, have the same set of offices in Omaha as Peter Kiewit, and share with Peter Kiewit the use of Inc.'s telephone switchboard. Included among South Prairie's board of directors is Omaha attorney Richard L. Waldron, who as late as November 29, 1971, was South Prairie's secretary, and who prepared its articles of domestication (which Darveau took to the qualification office in the Oklahoma State Highway Department while he was still Peter Kiewit's area manager). Prior to March 1, 1972, Darveau had been Peter Kiewit's area manager for 12 years and had been in its employ for 35 years; but he testified that since that date he has done no work for Peter Kiewit.

South Prairie has its own set of books and its own bank account. Inc. performs accounting services for both Peter Kiewit and South Prairie, and charges

each company a fee therefor which (inferentially) is collected by means of a bookkeeping transaction.[14]

2. The nature of Respondents' business

As stated *supra*, both Respondents are engaged in the construction of highways in Oklahoma. As previously found, under State law they cannot bid against each other for work to be performed by the State Highway Department or the State Turnpike Authority;[15] and there is no evidence that they have ever bid against each other for any job. Neither firm has ever subcontracted work to the other; nor has Peter Kiewit ever assigned any jobs or contracts to South Prairie. The Oklahoma State Highway Department determines for each firm on its prequalified-bidders' list the total amount of unperformed Department contracts to which it may be a party at any one time. This amount is unaffected by the resources of a particular firm's parent cor-

[14] There is no evidence about how this fee compares with the amount which would be charged therefor by an independent firm.

[15] If a contractor's interest in a particular job is aroused by the Highway Department's listing of jobs to be let, the contractor requests the agency to issue him a "proposal" document on which his bid must be submitted. When the contractor receives the "proposal" document, his name has already been stamped thereon by the State agency, and no other contractor can submit a bid on that "proposal" document. Peter Kiewit and South Prairie have never requested a "proposal" document for the same job. From Darveau's rather confused testimony on the subject, I conclude that he was aware in advance about Peter Kiewit's intention to submit bids (although not the amounts) on some State Highway Department work in July and August 1972.

poration, but is affected by whether the firm has had prior experience with the Department. The amount is over five million dollars for Peter Kiewit (an amount which permits it to bid on any Highway Department contracts) and fifteen million dollars for South Prarie. An individual Department contract of six million dollars is unusually large; but sometimes a contractor may be required to bid on several projects as a unit, and these may run as high as ten million dollars (never as high as fifteen million).

3. Respondents' offices, staff and equipment

Since about March 1, 1972, South Prairie has been occupying the Oklahoma City office, and an adjacent storage yard, occupied by Peter Kiewit when Darveau was its area manager.[16] None of the four office personnel changed when the office changed hands. Thus, Darveau, who had been the "number one man in the office" for Peter Kiewit, became South Prairie's president. He continued to prepare bids with the assistance of the same engineer estimator, Myron Blume.[17] The individuals who had worked for Peter Kiewit in the capacities of material engineer and secretary to Darveau now work in the same capacities on South Prairie's payroll. The superintendent in charge of the storage yard (Harry Marshall) is the same individual who served in that capacity with Peter Kiewit. However, South Prairie has a different telephone number from that previously assigned to Peter Kiewit. South Prairie's Oklahoma City office is now its main office, although South Prarie has field offices in other States.

[16] At the time of the hearing in October 1972, Peter Kiewit had just acquired a new office in Oklahoma City. Between March 1 and that acquisition, Peter Kiewit had been using as an office a construction trailer which it had initially installed as a temporary office for an airport job, whose job superintendent under Darveau also became Peter Kiewit's acting area manager when Darveau became South Prairie's president.

[17] Blume is also South Prairie's assistant secretary.

South Prairie hires its supervisory staff on a continuous basis, rather than (as with rank-and-file employees) for a particular job only. At the time of the hearing, a majority of South Prairie's supervisors had been supervisors for Peter Kiewit when Darveau was Peter Kiewit's area manager. Most of this group transferred between the two firms without any break in their employment. Supervisors who have moved from Peter Kiewit to South Prairie continue, normally, to serve in the same capacity, and continue to receive the same salaries and to be covered by the same insurance plan. A supervisor working for Peter Kiewit receives paychecks signed by Peter Kiewit, and a supervisor who works for South Prairie receives paychecks signed by South Prairie; but paychecks for both firms are made out in Omaha on the same pay machine. When Peter Kiewit lays off a Supervisor, whoever is in charge of the Kiewit job lets South Prairie know about his availability. If South Prairie wants to hire him (as it usually does),[18] it calls him at home. Frequently, if not usually, the arrangements

[18] I so infer from Darveau's testimony, as an adverse witness called by the General Counsel, that "Some of [Peter Kiewit's laid off supervisors] are not rehired." Darveau was a close-mouthed witness who carefully gave minimal answers to the General Counsel's questions.

are made in advance. On occasion, a supervisor on a Peter Kiewit job which had just been completed, or who quit a Peter Kiewit job, applied for work directly to Darveau, who testified, "The job was finished that they were on. They didn't have any other job to go to. If I wanted to hire them I would hire them." [19] If South Prairie has thus made arrangements to hire a Peter Kiewit supervisor for a South Prairie job upon completion of his Peter Kiewit job, he is paid (by whom, does not appear) for travel time between jobs. However, if there is an interval between such jobs, he receives neither a salary nor insurance benefits.

No supervisors who had worked for South Prairie have ever been hired by Peter Kiewit. According to Darveau, ". . . they have never had the occasion to do it. If we were without work it could happen. It has just never come up."

Employees on South Prairie's payroll are paid 50 cents to a dollar an hour less than those on Peter Kiewit's payroll, and do not receive the health and welfare benefits enjoyed by the latter. As is customary in the construction industry, South Prairie hires rank-and-file employees for a particular job only. There is little evidence of transfers of such employees between Peter Kiewit's and South Prairie's payroll.

---

[19] Darveau testified that if he had not hired these supervisors, Peter Kiewit would have either transferred them to a new job if one was available, or laid them off. Because the thrust of Darveau's testimony was directed to applications by Peter Kiewit supervisors on completed jobs, I infer that he hired few or none who had quit a Peter Kiewit job before completing their function thereon.

At the time of the hearing, South Prairie had performed or was performing two major jobs in Oklahoma—a surfacing contract with Nineteenth Seed Company near Edmond (which was still in progress), and a subcontract with Tulsa Paving in Tulsa (which had been completed).[20] With the exception noted below,[21] all six of South Prairie's supervisory force on the Edmond job had previously worked for Peter Kiewit.[22]

---

[20] Darveau's testimony leads me to infer that at the time of the hearing in October 1972, C. W. "Bill" Foster, who had been hired by Peter Kiewit in August 1970 and was its general superintendent as of September 30, 1972, was being seriously considered as general superintendent on the large Oklahoma Highway Department contract which South Prairie received in September 1972.

[21] The first job superintendent on the Edmond Job (Tiemeyer), who served as such for about the first 2 months, had been in business for himself when South Prairie hired him. At the time of the hearing in October 1972, Tiemeyer was South Prairie's vice president and field superintendent; and the Edmond job superintendent was Don Hurst, who had worked, in the same capacity, for Peter Kiewit on the Nowata job and then for South Prairie on the Tulsa Paving job. The record indicates that Hurst became the Edmond job superintendent immediately on completion of the Tulsa Paving job.

[22] Namely, Dan Kudron (South Prairie's paving foreman, who had been an hourly paid employee for Peter Kiewit at an airport job), A. L. Campbell (South Prairie's asphalt laydown foreman, who had worked for Peter Kiewit on the Nowata job and then worked for South Prairie on the Tulsa Paving job), Troy Evans (South Prairie's master mechanic, who had worked for Peter Kiewit as a master mechanic on the Nowata job and then for South Prairie on the Tulsa Paving job), Ole Nelson (South Prairie's truck foreman, who had worked for Peter Kiewit in that capacity at the Oklahoma City airport job and then for South Prairie on the Tulsa Paving job),

Most of the equipment and supervisors, and a few of the employees, used by South Prairie on the Tulsa Paving job came from a job performed by Peter Kiewit in Nowata. South Prairie's job superintendent on the Tulsa Paving job, Don Hurst, had served in this capacity for Peter Kiewit on the Nowata job, and South Prairie paid him the same salary he had been receiving from Peter Kiewit. In November 1971, Hurst described this Tulsa Paving job to Local 627's business representative, William Grant, as a job to be performed by Peter Kiewit, and advised Grant that when Peter Kiewit finished the Nowata job it would in turn be moving its crew and equipment to the Tulsa Paving job. When Peter Kiewit had no more need for a "batch plant" crew at Nowata, the concrete foreman, Brewer, told the crew to go down to South Prairie's Tulsa Paving job.[23] Three member

---

Van Rouak (who worked for Peter Kiewit on the Nowata job, and then for South Prairie for about 3 months on the Edmond job), and Gerald Brewer. Brewer worked for Peter Kiewit on the Nowata job as supervisor of the batch plant, then worked for South Prairie on the Tulsa Paving job as a "concrete superintendent" or form foreman, and then worked for South Prairie on the Edmond job. While the record fails to disclose Brewer's capacity on the Edmond job, Darveau's testimony that South Prairie hires supervisors on a continuous basis and that supervisors retain that capacity when moved between Peter Kiewit and South Prairie leads me to infer that Brewer was a supervisor on the Edmond job.

Darveau testified that he thought Eugene Peterman (who had worked for South Prairie for a time on the Edmond job) had worked for about a week on Peter Kiewit's Nowata job, but his name does not appear on the Peter Kiewit's payroll records.

[23] Brewer explained "that they to go [sic] South Prairie to get out from under the Operators so they could compete with the other contractors."

of the crew (the fourth was not "interested") drove directly to the Tulsa Paving job and began work there at about the same rate of pay, without applying therefor and without any break in employment.

The Peter Kiewit equipment (including the "batch plant") used on the Tulsa Paving job was leased by South Prairie under a written lease agreement, and an amount representing equipment rental at the "full going rate" was "charged to the job" and transferred from South Prairie to Peter Kiewit by means of a bookkeeping transaction. When the equipment was leased by South Prairie, decals bearing its name replaced decals thereon bearing Peter Kiewit's name.[24] The two corporations have leased equipment from each other on other occasions. The "full going" rental rate was in each case transferred from the lessee corporation's account to the lessor corporation's account; and customarily, the parties executed a written lease and the lessee's decal replaced that of the lessor. South Prairie has also executed written leases of its equipment to other construction companies; Darveau testified that this is not an unusual practice and that "We do it all the time." Darveau further testified that South Prairie customarily attaches its decal to any equipment it happens to be using, regardless of who owns it. In addition, Darveau testified that there was nothing unusual about South Prairie's renting the batch plant from another company. Darveau also testified that he usually has a record showing what Peter Kiewit equipment is

---

[24] The decals, which are circular and have similarly designed letters, both have a yellow center with black letters and a black border with yellow letters, but South Prairie's is about 5¾ inches in diameter and Peter Kiewit's about 8¾ inches.

available because not in use, and that if he wants a particular piece of this equipment he talks to Peter Kiewit's acting area manager, Niebrugge, who had been a job superintendent on an airport job (inferentially, the Will Rogers Airport job) under Darveau when Darveau was Peter Kiewit's area manager.

In March 1972, Peter Kiewit's employees at the Will Rogers Airport job removed certain equipment from the back of old Peter Kiewit trucks at that job and installed them on certain new trucks owned by South Prairie.[25] They also attached Peter Kiewit decals to these new trucks. The equipment so removed was worth more than the old Peter Kiewit trucks. At least two or three of these new trucks were still being used by Peter Kiewit on another job (the Warner job) at the time of the hearing. Darveau testified that South Prairie had bought the new trucks to use on a South Prairie job in Oklahoma City, that it then found it could rent trucks cheaper by the hour than it could operate its own trucks, and that its lease of such trucks to Peter Kiewit was a routine lease of equipment. Darveau further testified that the transfer of equipment between truck beds involved no difficulty; that it is commonly done; and that when ceasing to rent these trucks from South Prairie, Peter Kiewit will simply remove its equipment.

In June 1972, Gerald Kitchin, the truck mechanic foreman for Peter Kiewit on the Will Rogers Airport job, asked mechanic Kenneth Bolding, also employed by Peter Kiewit on that job, about working in South Prairie's Oklahoma City yard. Bolding replied that

[25] The equipment included equipment used on a lube truck, a winch truck, a form truck, a shop truck, and a water truck.

he did not want to go because he would lose his health and welfare benefits, "that being a non-union company." A few days later Gerald Kitchin told Bolding, ". . . we have it worked out to where you will go ahead and be paid through this office at the airport." Bolding then reported to South Prairie's Oklahoma City yard. During the next month, he worked in that yard constructing a "steel inserter," with the assistance of South Prairie equipment supervisor Harry Marshall and the part-time assistance of South Prairie mechanic Gale Kitchen, who had been employed by Peter Kiewit foreman Gerald Kitchin. Gale Kitchen was paid less than Bolding for working on this equipment. This "steel inserter" was later used by Peter Kiewit on the Warner job. While working on the "steel inserter," Bolding was paid at his old Union rate by Peter Kiewit checks, and after he left the South Prairie yard he went to work on Peter Kiewit's Warner job. The specifications on the Warner job called for the use of the "steel inserter," which involved an entirely different and novel technique and had been developed by Marshall and Darveau while they were on Peter Kiewit's payroll. However, there is no evidence that either Gale Kitchen or Bolding had any prior familiarity with the "steel inserter." As a result of this activity, about $5000 (representing labor and material) was transferred from Peter Kiewit's to South Prairie's account.

Respondents do not share hand tools or raw materials.

4. Respondents' labor policies

Darveau and Richard D. Coyne, who is a director of Inc., credibly testified that Inc. (through Coyne) sets Peter Kiewit's labor policy. Coyne credibly testified that South Prairie's board of directors sets

South Prairie's labor policies and "they of course would get their instructions from Peter Kiewit Sons', Inc." [26] As previously noted, when discussing South Prairie's failure to abide by the collective-bargaining agreement, Peter Kiewit attorney Doyle admitted that Peter Kiewit "was a controlling company of South Prairie." Coyne (who is also Peter Kiewit's vice president) and Darveau both testified that Peter Kiewit has nothing to do with South Prarie's labor policy. To the extent indicated *infra*, Part II E 2b, I do not accept Coyne's and Darveau's testimony in this respect.

E. *Analysis and Conclusions*

1. Whether the contract imposed any duty to bargain on Peter Kiewit

   a. Whether the majority status of the contractual bargaining representative in the contract unit it to be presumed

The General Counsel's contention that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to apply to the operating engineers on South Prairie's payroll the terms and conditions of the collective-bargaining agreement executed by Peter Kiewit assumes that Peter Kiewit would have violated the Act by refusing to apply such contract

[26] Darveau testified that Inc. directed him to do "none whatsoever" in connection with labor relations policies. On the basis of the witnesses' demeanor, I credit Coyne to the extent that their testimony conflicts. I note, moreover, that Darveau's testimony in this respect is inconsistent with certain other particulars of his own testimony (see *infra* Part II E 2b).

terms to the operating engineers on Peter Kiewit's payroll, who were admittedly covered thereby. In a case not involving the building and construction industry, the mere existence of the contract would warrant such an assumption: the existence of the contract would establish a virtually irrebuttable presumption of the majority status of the contracting Union or Unions in the contract unit during its term,[27] and the duty of the contracting employer or employers to bargain flowing from such a status would encompass the duty to honor the agreement.[28]

However, a more extensive inquiry is called for by the fact, to which all parties stipulated at the hearing, that both Respondents are employers "engaged primarily in the building and construction industry" and Local 627 is "a labor organization of which building and construction employees are members." Section 8(f) provides, in part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and

[27] *R. J. Smith Construction Co.*, 191 NLRB No. 135 (sl. op. p. 7; *Hexton Furniture Co.*, 111 NLRB 342, 343-344; *N.L.R.B.* v. *Marcus Trucking Co.*, 286 F. 2d 583, 593 (C.A. 2); *Shamrock Dairy, Inc.*, 119 NLRB 998, 1001-1002, 124 NLRB 494, 495-496, enfd. 280 F. 2d 665 (C.A. D.C.), cert. den. 364 U.S. 892; *Sanson Hosiery Mills, Inc.*, 92 NLRB 1102, 1103, enfd. 195 F. 2d 350 (C.A. 5), cert. den. 344 U.S. 836.

[28] The leading case in this area is *Strong Roofing & Insulating Co.*, 152 NLRB 9, 13, enforced as modified, 386 F. 2d 929 (C.A. 9), employer's petition for certiorari denied, 390 U.S. 920, modification reversed, 393 U.S. 357. Interestingly, this case involved a construction industry employer and Union. See also, *Johnson Sheet Metal, Inc.*, 179 NLRB 644, enfd. 442 F. 2d 1056 (C.A. 10).

> construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreement, . . . *Provided further*, that any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e).

The 1970-1973 agreement on its face covers "employees engaged (or who upon their employment, will be engaged) in the building and construction industry." In seeking dismissal of the complaint, Peter Kiewit contends that because of Section 8(f), the 1970-1973 agreement fails to create any presumption of majority status (citing *Smith Construction, supra*, 191 NLRB No. 135); and, further, that the General Counsel introduced no evidence that Local 627 represented any employees on Peter Kiewit's payroll.

Peter Kiewit's argument might perhaps be meritorious if the 1970-1973 agreement had been the initial bargaining agreement executed between Local 627 and Peter Kiewit;[29] or if Peter Kiewit had never attempted to live up to any contract with Local 627.[30]

---

[29] *Komatz Construction, Inc.*, 191 NLRB No. 150 (TXD pp. 16-17), mod. 458 F. 2d 317 (C.A. 8); *Davenport Insulation, Inc.*, 184 NLRB No. 114; *S. S. Burford, Inc.*, 130 NLRB 1641.

[30] Cf. *Smith Construction, supra*, 191 NLRB No. 135.

However, the 1970-1973 agreement was at least the third of a series of agreements which had been in effect since 1960. While the representatives of Peter Kiewit and Local 627 stated at the hearing that the 1960 agreement had been negotiated under Section 8(f), I conclude from the record evidence that the subsequent contracts (including the 1970-1973 agreement specifically involved here) were valid without regard to Section 8(f)(1). Thus, operating engineers represented by Local 627 have been on Peter Kiewit's payroll at all relevant times since 1960, including the time during which the parties negotiated and executed the 1970-1973 agreement. The immediate predecessor of the 1970-1973 agreement,[31] as well as the latter, contained a lawful union shop clause, and I infer that employees on Peter Kiewit's payroll in the contract unit were in compliance with that clause.[32] Further, I infer that the immediate predecessor of

---

[31] As previously noted, the 1970-1973 agreement, which covers both heavy and highway construction, succeeded two apparently concurrent or coterminous agreements covering the two kinds of work separately. However, evidence of majority in each of the prior contract units would have the same relevance to majority status in the combined contract unit as such evidence would have if the contract units had remained the same. *Emerald Maintenance, Inc.*, 188 NLRB No. 139, enfd. in material part, 464 F. 2d 698 (C.A. 5). Accordingly, for purposes of convenience my discussion describes as a single contract the two agreements immediately preceding the 1970-1973 contract.

[32] I so infer from Local 627's efforts to assure that Peter Kiewit complied with other provisions of the contract, from Local 627's failure to seek the discharge of any employees pursuant to the union security clause, and from Local 627's obvious interest in obtaining employee compliance with that clause.

the 1970-1973 agreement, as well as the latter agreement, contained a lawful hiring-hall provision.[33] Moreover, Peter Kiewit attempted to comply with at least the agreement preceding the 1970-1973 agreement, and also the latter agreement with respect to employees on its payroll. Accordingly, I conclude that at the time that Local 627 and Peter Kiewit executed the 1970-1973 agreement, Local 627 was the exclusive representative of Peter Kiewit's operating engineers under Section 9(a) of the Act, and that Peter Kiewit's bargaining obligations toward it at that time and all material times thereafter (including its obligation to honor the contract) were governed by Section 8(a)(5). *Bricklayers & Masons International Union, Local No. 3 (Eastern Washington Builders)*, 162 NLRB 476, enfd. 405 F. 2d 469 (C.A. 9); *Dallas Building and Construction Trade Council (Dallas County Construction Employers' Association, Inc.)*, 164 NLRB 938, 942-943, enfd. 396 F. 2d 677, 679-680 fn. 4 (C.A. D.C.); *Irvin-McKelvy Company*, 194 NLRB No. 8 (sl. op. pp. 5-6); S. Rep. No. 187 on S. 1555 (86th Cong. 1st Sess.) p. 28, 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 424 (G.P.O. 1959); *Komatz Construction, supra*, 191 NLRB No. 150 (TXD pp. 16-18); *Barwise Sheet Metal Co., Inc.*, 199 NLRB No. 64 (TXD p. 11).[34] Cf. *Ruttmann, supra*, 191

[33] I so infer from Ellis' testimony that the 1970-1973 agreement was a renegotiation of the prior agreement except as to wages, benefits, and the variation referred to *supra* fn. 31.

[34] The Eighth Circuit held in *Komatz* that "a prima facie showing of majority support is made by the mere fact of a union's incumbency." (458 F. 2d at 326). In rejecting the Board's bargaining order, the Court found the existence of re-

NLRB No. 136; *Smith Construction, supra*, 191 NLRB No. 135 (sl. op. pp. 2-4 and fn. 5); *Roberts & Schaefer*, 193 NLRB No. 131 (sl. op. p. 2, fn. 2). Thus, the contract carries with it a conclusive presumption of Local 627's majority status in the contract unit for the term of the contract.[35]

2. Whether the contract creates a unit which excludes the employees of the signatory employers other than Peter Kiewit

The foregoing discussion assumes that the contract involves a unit (among others) which excludes the employees of the signatory employers other than Peter Kiewit. Peter Kiewit, however, asserts that the contract unit consists of employees employed by all the signatory employers.[36] Peter Kiewit heavily

buttal evidence (absent from the instant record) to cast serious doubt on this presumed majority. Moreover, the Court found that the employer there (unlike Peter Kiewit) was not bound by any bargaining agreement at the time of the refusal to bargain. I note that in sustaining the Board's unfair labor practice finding based on a construction-industry employer's action in substituting for the incumbent representative a union which did not enjoy majority support, the Court quoted with approval the Board's statement in *Bricklayers, supra*, 162 NLRB at 478, that the prehire provisions of Section 8(f) were intended to apply "where the parties were attempting to establish a bargaining relationship for the first time," and "the entire legislative history of 8(f)(1) is couched in terms of 'prehire agreements,' a reference which can have no meaning in the situation where, as here, . . . employees have previously been hired." 458 F. 2d at 323, fn. 4.

[35] *Mishara Construction Co.*, 171 NLRB 471; *Island Construction Co., Inc.*, 135 NLRB 13; and cases cited *supra* fn. 27.

[36] The signatures of 7 contractors, including Peter Kiewit appear on the copy of the contract which is in evidence. An un-

relies on Article 20 of the contract, which is automatically renewed from year to year absent written notice, during a specified period prior to the anniversary date, of a desire to change or terminate it. Article 20 provides for such renewal "unless either party to this Agreement" gives such notice; states that any such notice by "the Union" is to be given by the Chairman of the Oklahoma State Subcommittee of the National Joint Heavy and Highway Construction Committee "to at least a majority of the Contractors signatory to this Agreement which will constitute notice to all;" and further states that any such notice by "the Contractors" is to be signed "by at least a majority of the Contractors signatory hereto" and sent to the Chairman of the Oklahoma State Subcommittee with a copy to the National Joint Heavy and Highway Construction Committee.

---

disclosed number of other contractors later signed identical agreements. Peter Kiewit does not make clear whether it believes such subsequent signatures rendered the employees of such employers part of the alleged multi-employer unit.

The complaint asserts the appropriateness of a unit limited to Peter Kiewit's employees. At the hearing, the General Counsel initially took the position that the contract unit was a multi-employer unit. Local 627's business representative, who represented it at the hearing, then stated that he did not take a different position; he further stated that during negotiations "each contractor represent[ed] his company . . . The contractors were separate entities, but they negotiated as a body." The General Counsel thereafter asserted that a unit limited to Peter Kiewit's employees is appropriate "so far as Peter Kiewit goes" but ". . . that doesn't mean to say there is not also an appropriate unit as far as the multi-employer group is concerned also." Neither the General Counsel's nor South Prairie's brief discusses this unit issue, and Local 627 has not filed a brief.

Even allowing for the right of any party to a multi-employer agreement to withdraw from a multi-employer bargaining relationship at an appropriate time,[37] Article 20, standing alone, does suggest that the contract contemplated a multi-employer unit. A similar suggestion might be conveyed by the contract preamble's recitation that the agreement is "entered into by and between CONTRACTORS signatory hereto, hereinafter referred to as 'CONTRACTOR.'" However, after reading the contract as a whole and considering the evidence regarding its negotiation and administration, I conclude that a unit excluding employees of signatory employers other than Peter Kiewit was contemplated.

Thus, whatever might otherwise be inferred from the preamble and from the recognition clause describing the unit as "all employees to be employed by the Contractor" on certain work, the agreement repeatedly uses the term "contractor" in contexts where the allusion is plainly to an individual employer.[38] More-

---

[37] *Hearst Consolidated Publications*, 156 NLRB 210, enfd. 364 F. 2d 293 (C.A. 2), cert. den. 385 U.S. 971.

[38] For example, the "Contractor" is to receive a fair day's work, is to judge workmen's performance, has the right to discharge for cause, must comply with requests for discharge for noncompliance with the union-security clause, is to determine the number of employees to be employed and the number of pieces of equipment to be operated by each, has the right to use any type of equipment consistent with safe operating practices, must hire employees through the Union, may reject employees referred by the Union, may determine the number of shifts and their hours, is obligated to give notice prior to any change in starting time, may shift workers between projects and between classifications within the craft jurisdiction, may require certain employees to work without supervision during

over, Local 627's business agent testified that when a grievance was filed against Peter Kiewit, it would be Peter Kiewit which selected the grievance committee member who, under the contractual grievance procedure, is to be "named by the Contractor." Also, grievances against Peter Kiewit under the contract were settled through Peter Kiewit's attorney, Doyle. Furthermore, during the negotiations which led up to the execution of the contract, Peter Kiewit had its own representative, Darveau, who actively participated in the negotiations, and the contract was executed on its behalf by its own attorney, Doyle. I do not agree with Peter Kiewit that this evidence of its retained right ultimately to choose action independently of the other negotiating contractors (and, therefore, of Local 627's retained right to accept or even to seek to compel such action) is nullified by Ellis' testimony about the bargaining conduct of one Saxton (in the employ of Dravo Corporation, which eventually executed the agreement through another representative), who also represented several other contractors who were otherwise unable to attend some or all of the negotiating sessions.[39] Ellis testified that Saxton

> . . . was in effect representing all of the contractors, during the progress of the negotiations.

---

certain periods, and must honor checkoff authorizations and remit the funds to Local 627. Further, a steward must be "One of the Contractor's employees" and may not be a non-working steward.

[39] Frazier-Davis Construction Company was not otherwise represented during the negotiations, but Saxton announced that he was its bargaining representative, and it signed the agreement through another representative.

> However, they had representatives there. They had quite a big buffet during th course of the bargaining that I think we all agreed at the first meeting that he was going to do all the talking and then as it turned out, everybody did all the talking.

Such informal (and unsuccessful) efforts to speed up the negotiations hardly constitute the "unequivocal agreement of the parties to bind themselves to a course of group bargining in the future"[40] which is the prerequisite to establishment of a multi-employer unit.

c. Whether Local 627 alone is the contractually recognized representative of a unit limited to operating engineers

At the outset of the hearing, Peter Kiewit's counsel (who executed the contract, and handled grievances thereunder, on its behalf) stated that the various Unions which signed the 1970-1973 agreement[41] are not joint representatives of all of Peter Kiewit's employees, that Local 627 represents a "certain group of employees that are employed" by Peter Kiewit, and that he did not "believe" that there was any overlap between the various groups of employees represented by the various Unions. Nonetheless, Peter Kiewit's brief contends that the complaint should be dismissed because there was "no evidence at all presented as to the representative status of the other four unions

---

[40] *Johnson Sheet Metal, supra,* 442 F. 2d at 1060 (C.A. 10), quoting from *Electric Theatre, Inc.*, 156 NLRB 1351, 1352. See also, *Komatz Construction, supra,* 458 F. 2d at 321.

[41] The agreement is signed by Local 627, 16 Carpenters' locals, 3 Teamsters' locals, the Oklahoma Laborers' District Council, and 9 Cement Masons' locals.

[sic] who together with Operating Engineers Local 627 constitute the multi-union bargaining unit."

In my view, such evidence would be wholly immaterial in view of the record evidence establishing that (as Peter Kiewit's counsel in effect admitted at the outset of the hearing) Peter Kiewit has recognized Local 627, and Local 627 alone, as the representative of its operating engineers and of no other employees. Thus, Local 627's initial wage demands were not the same as the initial wage demands of all the other Unions.[42] Moreover, no other Union spoke for Local 627 on any subject covered by the agreement, except that toward the end of negotiations all the Unions agreed to "take a uniform increase in wages"; and even then, Local 627 wanted to put part of the increase into an insurance, health, and welfare program. Further, the contract contains separate provisions for operating engineers regarding wages, health and welfare program, apprentice program, work rules, and checkoff, and was executed by Local 627. Moreover, in the administration of the contract, grievances by employees who are operating engineers are handled by Local 627 alone. Additionally, whatever might otherwise be inferred from the preamble's recitation that the agreement was "entered into by and between . . . the UNIONS signatory hereto, hereinafter referred to as 'UNION,'" followed by a clause recognizing "the Union as the sole collective bargaining agency . . . for all employees to be employed by the Contractor," the contract repeatedly uses the term

[42] I so infer from Ellis' testimony that "the negotiations more or less got in the stage of being finalized wherein the five crafts agreed they would take a uniform increase in wages."

"Union" in contexts where, plainly, the signatory labor organizations are not being referred to as a single entity. Thus, employees are required to join or remain members of "the Union" to keep their jobs, new employees must be referred through "the Union," and the business representative of "the Union" is to have access to jobs. Moreover, notwithstanding the preamble's purported definition, the contract at various points carefully refers in terms to all the signatory Unions (Articles 10, 11, 15, 16, 18). In view of the foregoing contract language, the provisions for notice to be filed by "the Union" of desire to terminate or modify the agreement as it approaches the automatic renewal date are ambiguous as to the effectiveness under the contract of any such notice filed by Local 627 alone [43] and, therefore, fail to support the contention that other Unions shared with Local 627 the representation of Peter Kiewit's operating engineers.

2. Whether Respondents violated the Act by failing and refusing to apply the contract to the operating engineers on South Prairie's payroll

a. Introduction: the issue defined

The motivation for South Prairie's entry into the Oklahoma highway construction business is admitted

[43] This ambiguity is not resolved by the requirement that the notice be given to "the Contractors" by the Oklahoma State Subcommittee. This provision does not afford the Subcommittee the right to refuse to forward such a notice because only one Union desired to file it. This provision may well have been inserted as a means of assuring that all the remaining signatory Unions would learn that one or more of them would not, as previously, engage in joint negotiations for a new contract.

and undisputed. Thus, Darveau testified that the motivating factor that brought South Prairie into Oklahoma was that Peter Kiewit allegedly could not competitively bid on contracts in Oklahoma because, owing to the Union contract, "our competitors were several cents or quite a little bit below us on the salaries they were paying." Darveau further stated that it was he who made the decision that South Prairie should come into Oklahoma. While Coyne (who is a vice president of Peter Kiewit and a director of Inc.) credibly testified that it was Inc.'s board of directors that made this decision, he admitted that its reasons therefor were essentially the same as those cited by Darveau when he complained to Peter Kiewit's board of directors that Peter Kiewit could not competitively bid on Oklahoma highway contracts—namely, the wage scale and benefits called for by the Union agreement. Moreover, Darveau admittedly recommended to Inc. that a non-Union company should be brought in. Indeed, South Prairie asserts in its helpful brief (p. 3):

> Peter Kiewit is the only highway contractor in Oklahoma to have signed the collective-bargaining agreement (GC Ex. 5). All of the company's competitors operate non-union and pay a lower wage scale than the contract requires. Because of this disparity in labor costs, PETER KIEWIT SONS', INC. recognized that its subsidiary, Peter Kiewit, was not sufficiently competitive in highway construction in Oklahoma and that a non-union subsidiary (South Prairie) should be activated in Oklahoma, to compete on equal terms

> with the non-union competitors. (Tr. 127-128, 134-143, 151-152)"

" The General Counsel's brief requests me to make a specific finding that Respondents "entered into" the "scheme" which brought South Prairie into Oklahoma "with the intention that Peter Kiewit cease doing business in the State of Oklahoma." It is true that in May or June 1970, Darveau told Local 627 that if it did not get more contractors signed to the collective-bargaining agreement, Peter Kiewit was going to quit bidding work in Oklahoma and leave the State. Further, Coyne conceded that "We probably discussed [whether to make this decision] for a period of time." Moreover, when asked whether "you all" had decided to get out of Oklahoma but, when the instant charges were filed, had reconsidered and decided to stay, Coyne testified, "I don't think so;" and when then asked whether the charges had affected Peter Kiewit's decision to stay, Coyne replied, "Not that I know of." The cautiousness of this testimony by Coyne (apparently an attorney) suggests that although without direct knowledge, he may have suspected that some of his fellow directors or other executives may have privately decided to have Peter Kiewit stop doing business in Oklahoma and may have later had second thoughts about their private decision because of the charges herein. Further, when South Prairie came into the State it took over what had been Peter Kiewit's main office, its area manager, its engineer estimator, and some of its supervisors. South Prairie had already performed elsewhere all of the same kinds of work performed by Peter Kiewit in Oklahoma. Nor is there any specific record evidence that Peter Kiewit began to perform or successfully bid on any work after South Prairie's advent; where the record refers to Peter Kiewit work currently in progress, all specifically identified projects on which such work was being done are pre-South Prairie work in the course of completion. See also *supra* fn. 10.

On the other hand, Coyne testified that when initially deciding to bring in South Prairie, Inc.'s board of directors "specifically decided that [Peter] Kiewit would stay [in Okla-

Moreover, this motivation is chargeable to both Respondents even giving unqualified respect to corporate lines. Thus, Darveau was Peter Kiewit's area manager when he complained to its board of directors about its alleged noncompetitive status, and when he recommended to Inc. that a non-Union company should be brought in. Further, Darveau was South Prairie's president when he refused to honor the agreement with respect to the employees on South Prairie's payroll on the ground that South Prairie "had elected

---

homa] and try to compete in some of the types of work in some of the areas where possibly they could be competitive." Although this testimony was not corroborated by other directors or by documentary evidence such as the corporate minutes, and (even if untrue) could not likely be directly contradicted by evidence reasonably available to the General Counsel or Local 627, Coyne's demeanor in tendering it impressed me favorably. Furthermore, although Darveau testified on direct examination as an adverse witness for the General Counsel that South Prairie is engaged in heavy and highway work in Oklahoma, on cross-examination by South Prairie's attorney he testified that in Oklahoma South Prairie is engaged solely in the highway construction business. There is no specific evidence of any Oklahoma non-highway work sought or performed by South Prairie, and a number of Oklahoma heavy-construction contractors in addition to Peter Kiewit had executed the bargaining agreement. Moreover, in July and August 1972, Peter Kiewit bid on three State Highway Department contracts; and while these bids were unsuccessful, they were not so far out of line with the successful bids as to suggest they were a sham (*infra* fn. 46). Further, at the time of the hearing Peter Kiewit had just acquired a new office in Oklahoma. For these reasons, and the additional reasons summarized *supra* fn. 10, I conclude that the record fails preponderantly to show that when it was initially decided to bring in South Prairie, it was intended that Peter Kiewit cease doing business in Oklahoma.

to be non-union and do their work non-union," and when he testified at the hearing that "We activated [South Prairie] to be competitive with our competitors." In making these decisions, Darveau was unquestionably acting solely on behalf of the corporate interest, for he owns no stock in either Respondent."[45]

Further, I conclude that as a consequence of the foregoing arrangement, work was performed by South Prairie which, absent the arrangement, would have been performed by Peter Kiewit and, therefore, by employees concededly protected by the bargaining agreement. Thus, Respondents bid on and performed the same kind of work in the same price range. The parties to the arrangement to bring in South Prairie manifestly contemplated that South Prairie would thereby obtain highway construction work on which, absent South Prairie's presence, Peter Kiewit might have bid. Moreover, although the bargaining agreement required Peter Kiewit to pay rank-and-file employees higher wages and benefits than non-Union

---

[45] Cf. *Frank M. Smith Associates, Inc.*, 194 NLRB No. 34 (TXD pp. 4 fn. 5, 5), where the decision to arrange for a separate corporation in order to bid on jobs without Union labor was made by an individual (Frank Smith) who not only was the president of both the Union corporation and the non-Union corporation but also was a majority stockholder in each. Accordingly, there, unlike here, the decision could be attributed to either corporation only on the assumption (which largely begged the question at issue) that in making this decision Smith was acting for them rather than to forward his personal interests as a shareholder. A similar situation was presented in *Gerace Construction, Inc.*, 193 NLRB No. 91, where moreover, the common stockholder transferred his stock in one of the two corporations (sl. op. p. 3, TXD p. 4). Both *Smith Associates* and *Gerace* are discussed in greater detail *infra*.

competitors, that same agreement afforded Peter Kiewit the assistance of the Union hiring hall (never used by South Prairie) in obtaining qualified employees. Accordingly, Peter Kiewit bid (in some cases, successfully) on a number of Oklahoma Highway Department contracts until 3 months before South Prairie's advent, and also bid on such contracts beginning 5 months thereafter.[46] When asked why Peter Kiewit failed to bid on any Highway Department contracts during this interval, Darveau and Coyne did not suggest that such bids would have been futile, but merely explained that Peter Kiewit had too much other work or was having a hard time finishing up its other projects. Furthermore, Respondents' exhibits suggest that as a whole, Peter Kiewit's unsuccessful bids were, if anything, proportionally closer than South Prairie's to those of the successful bidders.[47] In any event, Respondents' purpose in bringing in South Prairie and their failure to submit any bids on the same job[48] lead me to conclude that any doubts about whether

[46] While the three post-South Prairie bids (July-August 1972) were unsuccessful, they were proportionally closer to the successful bids than some of Peter Kiewit's unsuccessful pre-South Prairie bids.

[47] This is true whether one compares Respondents' 1972 bids as a whole or compares as a whole all bids by Respondents described in the exhibits.

[48] While it is true that as to much of this work, a bid by one Respondent legally foreclosed any bid by the other, Respondents must have been aware of this limitation when participating in the arrangements to bring South Prairie into Oklahoma. Further, it was Peter Kiewit's own failure to file a financial report or seek an extension for such filing which caused its absence from the prequalified-bidders' list between May and July 5, 1972.

Peter Kiewit could have obtained work awarded to South Prairie should be resolved against Respondents. See *N.L.R.B.* v. *Swinerton*, 202 F.2d 511, 515-516 (C.A. 9), cert. den. 346 U.S. 814.[49]

Furthermore, the undisputed evidence establishes that both before and after South Prairie's entry into Oklahoma, Peter Kiewit performed and bid on the same kind of highway work as that performed by South Prairie. Moreover, South Prairie's Oklahoma operation used the same top management, the same offices, the same clerical staff, the same check-issuing system, many of the same managers and supervisors, and some of the same operating engineers, and decided on whether and how much to bid through the same individuals, as had Peter Kiewit in its Oklahoma highway-construction operation. I conclude that if such South Prairie projects had been performed by Peter Kiewit, a unit consisting of the operating engineers on such projects and Peter Kiewit's operating engineers on the remaining projects would be appropriate.[50] I further conclude that if such projects had

[49] Cf. *Gerace, supra,* 193 NLRB No. 91 (sl. op. p. 4), where the Union firm performed much larger jobs than the non-Union firm, and there was no showing that the Union firm had lost any business to the non-Union firm or that any employee of the Union firm had lost work he otherwise would have had.

[50] See *Manitowoc Shipbuilding, Inc.*, 191 NLRB No. 137 (sl. op. pp. 3-6). Cf. *Smith Associates, supra,* 194 NLRB No. 34 (TXD pp. 10-11), and *Gerace Construction, supra,* 193 NLRB No. 91 (sl. op. p. 4), where the Union corporation's contract covered a craft unit and the non-Union corporation had no craft divisions. And see *Central New Mexico Chapter, National Electric Contractors Association, Inc.*, 152 NLRB 1604, 1607-1608, holding that the employees of a residential

been performed by Peter Kiewit, the operating engineers on such projects would have been covered by the bargaining agreement between Peter Kiewit and Local 627.[51] Accordingly, if the South Prairie projects had been performed by Peter Kiewit, a failure and refusal by Peter Kiewit to apply the bargaining agreement to such employees would have violated Section 8(a)(5) and (1) of the Act. See the discussion *supra*, Part II E 1.

Succinctly stated, the instant case therefore boils down to this: Peter Kiewit and Local 627 had a collective-bargaining agreement which covered all of Peter Kiewit's heavy and highway construction in Oklahoma and which Peter Kiewit was under a statutory duty to honor. Peter Kiewit believed that because it was bound by this contract, it was not sufficiently competitive with other firms engaged in Oklahoma highway construction, which firms were non-Union

---

contractor could not appropriately be included in a unit including the employees of a commercial and industrial contractor which occupied single-employer status with the residential contractor. The Board there relied on, *inter alia*, "the fact that the labor policies of [the] residential contractor . . . are based on its own needs and are not dependent on those of [the] commercial and industrial contractor." See the discussion *infra* Part II E 2b.

[51] The fact that South Prairie did not start its operations in Oklahoma until after the execution of the bargaining agreement (which, indeed, was the very reason for South Prairie's entry) establishes that in executing the agreement, Local 627, at least, could not and did not have in mind the question of whether it covered employees on South Prairie's payroll. Cf. *B & B Industries, Inc.*, 162 NLRB 832, where the non-Union firm was in operation at the time the Union firm executed the bargaining agreement, and there was no effort to conceal its existence from the Union.

and paid lower wages and benefits than those required by the contract. Peter Kiewit recognized that its own ability to compete and its own profits were subject to the Union contract. However, because Peter Kiewit is a wholly owned subsidiary of Inc., Peter Kiewit, as well as Inc., was concerned about the effect of the Union contract on Inc.'s profits derived from Oklahoma highway construction, which profits Inc. was then receiving solely in the form of dividends on Peter Kiewit's stock. Accordingly, for the purpose of maximizing Inc.'s dividends derived from Oklahoma highway construction whose profits would eventually enure to Inc., Inc. and Respondents arranged to bring another wholly owned subsidiary of Inc., South Prairie, into Oklahoma. As a result of this arrangement, South Prairie performed construction work which Peter Kiewit would otherwise have performed with a work force concededly covered by the Union contract; and South Prairie performed such work with a work force whom Local 627 had not knowingly agreed to exclude from the contract's coverage and who, if they had been working on projects concededly performed by Peter Kiewit, would have been validly included in the contract unit. Accordingly, this arrangement put Inc. in the same economic position, with respect to these projects, as it would have been in had no Union contract ever been agreed to by another wholly owned subsidiary, Peter Kiewit. The General Counsel contends that under these circumstances, Respondents' failure and refusal to apply the contract to South Prairie's operating engineers violated Section 8(a)(5) and (1) of the Act. For the reasons stated hereafter, I agree.[52]

---

[52] In disposing of the instant case on the merits, I am aware of the 1970-1973 contract's "Settlement of Disputes" clause,

b. Whether Respondents violated the Act

Critical to the question of whether Respondents violated the Act by failing and refusing to apply the bargaining agreement to the operating engineers on South Prairie's payroll is the fact that South Prairie was brought into Oklahoma for the specific purpose of circumventing Peter Kiewit's statutory duty to honor the agreement. Where, as here, a particular legal entity has participated in or has been used as a means of circumventing a statutory duty imposed on an at least nominally separate entity, cases presenting a wide variety of factual situations have held both entities answerable for an unfair labor practice even where each would be treated separately where the intended evasion would not be effectuated by respecting corporate lines or like legal distinctions.[53] While the con-

---

which is applicable by its terms to "cases of violation, misunderstanding or differences in interpretation of this agreement." A "matter" not previously settled under this clause is to be disposed of by a 3-man committee (including a neutral member) whose decision is "binding on the parties hereto and on all persons and organizations in any way involved hereunder." However, because South Prairie contends that it is in no respect bound by the bargaining agreement which contains this provision, and because the question of whether South Prairie is obligated to apply the contract to employees on its payroll could not be submitted to the committee until after judicial determination of the threshold question of whether South Prairie was bound by the agreement's arbitration clause (*John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 546-547), I conclude that the Board's policy of deferring the disposition of certain unfair labor practice cases to the arbitration process (*Collyer Insulated Wire*, 192 NLRB No. 150) is inapplicable here. Cf. *Medical Manors, Inc.*, 199 NLRB No. 139. Nor do Respondents suggest otherwise.

[53] See, e.g., *N.L.R.B.* v. *Deena Artware, Inc.*, 361 U.S. 398; *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100, 105-107;

clusion of liability is frequently couched in terms of a finding that the nominally separate entities occupy single-employer status, or that one is the *alter ego* or successor of the other,[54] liability may be imposed without selecting any of these labels.[55]

Textile Workers Union v. *Darlington Mfg. Co*, 380 U.S. 263; *Majestic Molded Products, Inc.* v. *N.L.R.B.*, 330 F.2d 603, 607 (C.A. 2); *AAA Electric, Inc.*, 190 NLRB No. 23; *N.L.R.B.* v. *United States Air Conditioning Corp.*, 302 F.2d 280 (C.A. 1); and court cases cited *infra* fns. 55-56.

A particularly clear example of the extent to which such liability may turn on the purpose to evade is presented by *Diaper Jean Manufacturing Co.*, 109 NLRB 1045, enfd. 222 F.2d 719 (C.A. 5), where the Respondents included a 2-man partnership and two proprietorships, each solely owned by a different partner. One of the proprietorships was not included in the order directed against the partnership, but the other proprietorship was named on the ground that its formation "was part of the plan which culminated in the move [of part of the plant initially operated by the partnership, and] it follows that it is liable for all the unfair labor practices consequent upon that move." Cf. *Joe Robertson & Son, Inc.*, 174 NLRB 1073, where there was no finding that both Respondents were involved in an effort to evade the statutory obligation of either.

[54] The complaint alleges that Respondents "constitute a single employer for purposes of collective bargaining . . . , or in the alternative, Respondent South Prairie is a successor employer to Respondent Peter Kiewit, or in the alternative Respondent South Prairie is the *alter ego* of Respondent Peter Kiewit." The General Counsel's brief seems to disclaim the single-employer theory, and asserts that South Prairie is Peter Kiewit's *alter ego* (br. pp. 7, 5). For reasons indicated herein, I find it unnecessary to pass on the issues so raised.

[55] E.g., *N.L.R.B.* v. *Frontier Guard Patrol*, 399 F.2d 716 (C.A. 10); *N.L.R.B.* v. *Gluek Brewing Co.*, 144 F.2d 847, 855-856 (C.A. 8); *N.L.R.B.* v. *Ozark Hardwood Co.*, 282 F.2d 1,

Moreover, the record contains other evidence which has been held (ordinarily, through an intervening label of "single employer," "*alter ego*," or "successor") to point toward the imposition of such liability. Thus, both Respondents are wholly owned subsidiaries of a single parent corporation, which maintains close supervision over their financial affairs by performing their accounting services, and in the past have had common officers. Respondents' respective boards of directors have the same Omaha, Nebraska, office, and the same switchboard. Both Respondents are engaged in highway construction in Oklahoma. When South Prairie came into Oklahoma to perform such work, Peter Kiewit's "top man" in Oklahoma (Darveau) became South Prairie's president and its "top man" on its Oklahoma operations, continued to prepare bids with the assistance of the same estimator, and continued to occupy the same office staffed by the same individuals. South Prairie began to occupy the storage yard previously occupied by Peter Kiewit, under the same yard superintendent. Most of South Prairie's supervisors had previously worked for Peter Kiewit in the same capacity, with the same salaries and under the same insurance plan. Most of these former Peter Kiewit supervisors transferred between the two firms without any break in their employment, and (frequently if not usually) South Prairie hired them after being notified by Peter Kiewit of their availability. Paychecks for both firms are made out in Omaha on the same pay machine. A supervisor who served as job superintendent for both firms described

---

4-5 (C.A. 8); *Manley Transfer Company, Inc.* v. *N.L.R.B.*, 390 F.2d 777 (C.A. 8); *N.L.R.B.* v. *Mastro Plastics Corp.*, 354 F.2d 170, 179-180 (C.A. 2), cert. den. 384 U.S. 972.

as a Peter Kiewit job a job to be performed by South Prairie. Further, most of the equipment used by South Prairie on the Tulsa Paving job came from Peter Kiewit's Nowata job, and Peter Kiewit's "batch plant" crew went onto the Tulsa Paving project without applying to South Prairie for a job. Further, South Prairie's willingness to make its personnel's unique skills available to build a steel inserter acutely needed by Peter Kiewit (and it alone) seems to reflect concern about protecting Inc. from any losses incident to South Prairie's Oklahoma entry, rather than considerations of ordinary industrial courtesy.

In disclaiming the commission of unfair labor practices, South Prairie heavily relies on the testimony of Coyne and Darveau that Peter Kiewit has nothing to do with South Prairie's labor policy. Plainly, however, this policy includes, as a matter of fundamental importance, South Prairie's admitted decision to operate in Oklahoma (as elsewhere) on a non-Union basis, a decision in which Peter Kiewit participated according to Darveau's uncontradicted testimony. Decision in an unfair labor practice case which arose for the very reason that the two Respondents and Inc. decided that South Prairie would follow a non-Union labor policy in Oklahoma in order to circumvent Peter Kiewit's Union agreement can hardly be based on a finding that Respondent Peter Kiewit had nothing to do with Respondent South Prairie's labor policy.[56]

---

[56] *Cf. Frontier Guard Patrol, supra,* 399 F.2d 725 (C.A. 10); *N.L.R.B.* v. *Royal Oak Tool & Machine Co.,* 320 F.2d 77 (C.A. 6). In *Gerace Construction, supra,* 193 NLRB No. 91 (sl. op. p. 3), unlike here, one of the participants in the decision to bring in another company thereafter relinquished his stockholdings in that company.

In any event, the credited evidence establishes that Inc. directly determines Peter Kiewit's labor policy and instructs South Prairie's board of directors as to the labor policy to be followed by South Prairie. Indeed, Peter Kiewit's attorney conceded to Local 627 that Peter Kiewit was "a controlling company of South Prairie."

Furthermore, the weight of other evidence on which South Prairie relies is to some extent limited by additional considerations. Thus, while only a limited number of rank-and-file employees transferred between Respondents' respective projects, the record shows that in the highway construction industry such employees are ordinarily hired for the duration of a particular job only, and obtain their next job with little or no reference to whether it was performed by the same employer which performed their last job. Accordingly, little employee interchange would likely occur even between Peter Kiewit's or South Prairie's own jobs. Further, although Darveau testified that leasing of surplus equipment between highway construction firms is a common practice and that Respondents reimburse each other for such equipment at the "full going" rate, even as between Respondents' immediate management the "rent" for such a lease between Respondents has the short-term effect of a non-interest-bearing unsecured loan, while a lease between a Respondent and an outside firm involves an immediate cash inflow or outflow.[57] Moreover, the accessibility to South Prairie of Peter Kiewit's equipment is facilitated by South Prairie's list (inferen-

[57] Of course, as to every such transaction between Respondents, the ultimate interest is Inc.'s, both as creditor and as debtor.

tially, supplied by Peter Kiewit) of Peter Kiewit's equipment; there is no evidence that Respondents either provide such lists to or receive them from outside contractors. Additionally, although the State laws' limitations on the amount of unperformed Highway Department work are much higher for Peter Kiewit (more than 500 million dollars) than for South Prairie (15 million dollars), the dollar amounts of the contracts let by the Department render this difference of little practical effect. Furthermore, the limits on South Prairie will increase as it acquires further experience on Highway Department work; and presumably, Inc. can also have the limit increased by transferring assets to South Prairie's account, either from Peter Kiewit or from other sources. Further—although Darveau testified that he decides what jobs South Prairie will bid on and that Niebrugge (a former Darveau subordinate who had become Peter Kiewit's acting area manager) or some other Peter Kiewit officer makes this decision for Peter Kiewit—in the absence of affirmative, specific, detailed, and credible testimony otherwise, I infer that from time to time Respondents' top Oklahoma officials conferred with each other and Inc. on which Respondent was to bid on particular jobs.[58] Nor do I

[58] I so infer from the fact that Respondents and their officials were all working in the ultimate interest of Inc.; from the further fact that Darveau had previously worked for Peter Kiewit for 35 years (the last 12, as its area manager) and obviously had acquired a number of contacts there; from the fact that Respondents have never bid against each other on any jobs; from Darveau's testimony that he was aware in advance of Peter Kiewit's plan to make certain bids in July and August, 1972 (*supra* fn. 15); and from the fact that on June 20, 1972, then South Prairie president Darveau correctly

construe Local 627's and its parent International's unsuccessful efforts to procure South Prairie's signature on the agreement as an admission that absent such a signature, South Prairie was under no Section 8(a)(5) obligation to Local 627. South Prairie's signature would probably have not affected its Section 8(a)(5) obligation *vel non* to honor the agreement, while it might well have afforded Local 627 a Section 301 cause of action without regard to South Prairie's duties under Section 8(a)(5). See *Smith Construction, supra,* 191 NLRB No. 135. In any event, a party's effort to obtain acknowledgement of its rights without the expense and delay of litigation can hardly be construed as an admission that they could not be established through litigation if necessary.

To be sure, Respondents are separate corporations with separate accounting records, separate bank accounts, and different officers. They have separate offices in Oklahoma with separate telephone numbers, and separate Oklahoma area supervisors [59] with separate supporting office staffs. The supervisors for each Respondent work full-time on the payroll of that Respondent, and Respondents do not participate in any of the same projects. Respondents do not share hand tools or raw materials. Further, neither has ever subcontracted work to the other; nor has Peter Kiewit ever assigned any jobs or contracts to South Prairie.

---

advised International Representative Clark that Peter Kiewit was not going to bid on the Turnpike Authority jobs being let that day. Darveau repeatedly used the term "We" when referring to Peter Kiewit.

[59] Darveau performs for South Prairie the same Oklahoma functions he had previously performed as Peter Kiewit's area manager.

Moreover, the employees on Peter Kiewit's payroll receive the wages and benefits called for by the Union contract; while the employees on South Prairie's payroll receive lower wages and no benefits.[60] However, I regard such evidence as insufficient to insulate Respondents from each other in view of the record as a whole.

No different result is indicated by *Gerace Construction, supra,* 193 NLRB No. 91, or *Smith Associates, supra,* 194 NLRB No. 34.[61] In *Gerace* the bargaining agreement was executed after the non-Union corporation's formation, whose purpose was to obtain a job for which an assurance against strikes was required rather than to circumvent the agreement. In *Smith Associates,* the non-Union corporation was reincorporated to bid on jobs which the Union corporation was "not given a chance to bid on because of its high union carpenter-labor costs." (TXD 4 fn. 4, 5, 14). In the instant case, Peter Kiewit was qualified to bid on the same kind of or on the same highway construction work as that performed or bid on by South Prairie, and actually obtained and performed some of this kind of highway work.

---

[60] If not constrained to reason otherwise, I would conclude that this differential was entitled to little or no weight in justifying the contention that Respondents are to be treated as separate entities, because this alleged separation is offered as the principal legal justification for the differential. However, the reasoning which I would prefer appears to be rejected in *Gerace, supra,* 193 NLRB No. 91 (sl. op. p. 4).

[61] These cases have been touched on *supra* fns. 45, 49, 50, 56, 60.

Conclusions of Law

1. Respondents are an employer or employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 627 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act: All employees on the payroll of Respondent Peter Kiewit Sons' Co. and Respondent South Prairie Construction Co. in the job classifications listed under "Schedule A, Operating Engineers" and "Schedule B, Operating Engineers" in the collective-bargaining agreement executed by Local 627 and Peter Kiewit and effective July 1, 1970, and who perform work in Oklahoma listed in Article 1 of such agreement, excluding engineers, clerical employees, guards, timekeepers, superintendents, mechanical superintendents, assistant superintendents, general foremen, professional employees, watchmen, and supervisors as defined in the Act.

4. At all times on and after July 1, 1970, Local 627 has been the exclusive bargaining representative of all the employees in the aforesaid unit pursuant to Section 9(a) of the Act.

5. By failing and refusing, on and after February 1972, to recognize and bargain with Local 627 as the exclusive representative of employees on South Prairie's payroll in the aforesaid unit, to honor the aforesaid collective-bargaining agreement with respect to such employees, and to apply to such employees the terms and conditions of that agreement,

Respondents have violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents have committed certain unfair labor practices, I shall recommend that they cease and desist from such conduct and from any like or related invasion of employees' Section 7 rights, and take certain affirmative action which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act. I shall recommend that Respondents recognize and bargain with Local 627, on request; that Respondents, on Local 627's request, give retroactive effect to the aforesaid agreement with respect to the aforesaid employees on South Prairie's payroll; that they make such employees whole for any losses they may have suffered by reason of Respondents' failure to apply the aforesaid agreement to them, with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716; and that they pay to the appropriate source the contributions with respect to such employees prescribed in such agreement for an apprentice program and the health and welfare fund of Local 627, with interest as prescribed in *Isis, supra.* I shall also require Respondents to post appropriate notices. Because some of the South Prairie projects covered by the reimbursement order have or may have been completed, and some of the affected employees who worked on such projects may no longer be working for Respondents, I shall also re-

quire Respondents to mail a copy of the notice to each affected employee who is no longer working for them when the notices are posted.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [62]

ORDER

Respondents Peter Kiewit Sons' Co. and South Prairie Construction Co., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize International Union of Operating Engineers, Local No. 627, AFL-CIO (herein called Local 627) as the representative of the employees on South Prairie's payroll in the aforesaid unit and refusing to honor as to such employees the collective-bargaining agreement executed by Peter Kiewit and Local 627 effective July 1, 1970.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under the Act.

---

[62] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, recognize and bargain with Local 627 as the exclusive representative of such employees.

(b) On request by Local 627, honor and give retroactive effect to such agreement with respect to such employees.

(c) Make such employees whole for any losses they may have suffered by reason of Respondents' failure and refusal to honor such agreement in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Pay to the appropriate source the contributions with respect to such employees prescribed in such agreement for an apprentice program and the health and welfare fund of Local 627, in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary to analyze and compute the amount of backpay due under the terms of this Order.

(f) Post in their offices and construction sites in Oklahoma copies of the attached notice marked "Appendix." [63] Copies of said notice, on forms pro-

---

[63] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATION-

vided by the Regional Director for Region 16, after being duly signed by Respondents' authorized representatives, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(g) Mail a copy of such notice to each of such employees who is no longer working for either Respondent on the date such notices are posted.

(h) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated, Washington, D. C.

/s/ Nancy M. Sherman
NANCY M. SHERMAN
Administrative Law Judge

AL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a Trial in Which All Parties Had the Opportunity to Present Their Evidence, It Has Been Decided That We Violated the Law by Refusing, to Bargain with a Union and by Refusing to Honor a Union Contract. We Have Been Ordered to Post This Notice. We Intend to Carry Out the Order of the Board and Abide by the Following.

WE WILL NOT refuse to recognize INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627, as the exclusive bargaining representative of the employees on SOUTH PRAIRIE'S payroll in the following appropriate unit:

All employees on the payroll of either PETER KIEWIT SONS' CO. or SOUTH PRAIRIE CONSTRUCTION CO. who are in the job classifications listed under "Schedule A, Operating Engineers" and "Schedule B, Operating Engineers" in the contract signed by Local 627 and Peter Kiewit and effective July 1, 1970, and who perform work in Oklahoma listed in Article 1 of such agreement.

The following persons are not in this unit: engineers, clerical employees, guards, timekeepers, superintendents, mechanical superintendents, assistant superintendents, general foremen, professional employees, watchmen, and supervisors as defined in the Act.

WE WILL NOT fail and refuse to honor this contract with respect to such employees on SOUTH PRAIRIE'S payroll.

WE WILL, on request, recognize and bargain with Local 627 as the exclusive representative of such employees on SOUTH PRAIRIE'S payroll, and honor the contract with respect to such employees.

WE WILL make such employees whole, with interest, for any loss suffered because of our failure to honor the contract as to them.

WE WILL pay to the appropriate source the contributions, with interest, with respect to such employees prescribed in such agreement for an apprentice program and the health and welfare fund of Local 627.

PETER KIEWIT SONS' CO.

Dated ——— By ———
(Representative) (Title)

SOUTH PRAIRIE CONSTRUCTION CO.

Dated ——— By ———
(Representative) (Title)

This Is An Official Notice and Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Rm. 8-A-24, 819 Taylor Street, Fort Worth, Texas (Tel. 817—334-2941).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Nov. 4, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 73-2277

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

SOUTH PRAIRIE CONSTRUCTION CO.
PETER KIEWIT SONS' CO.,
Intervenors

Before: Tamm and Leventhal, Circuit Judges; Jack R. Miller,* Judge U.S. Court of Customs and Patent Appeals.

ORDER

On consideration of intervenor's (South Prairie Construction Company) petition for rehearing, it is

* Sitting by designation pursuant to Title 28 U.S. Code Section 293(a).

ORDERED by the Court that intervenor's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Nov. 4, 1975, United States Court of Appeals
for the District of Columbia Circuit,
Hugh E. Kline, Clerk]

No. 73-2277

LOCAL NO. 627, INTERNATIONAL UNION
OF OPERATING ENGINEERS, AFL-CIO
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

SOUTH PRAIRIE CONSTRUCTION CO.
PETER KIEWIT SONS' CO.,
Intervenors

ORDER

Intervenor's (South Prairie Construction Company) suggestion for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Circuit Judges Tamm, MacKinnon, Robb and Wilkey voted to grant intervenor's suggestion for rehearing *en banc*.

Nos. 75-1097 and 75-1243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

SOUTH PRAIRIE CONSTRUCTION CO., *Petitioner,*

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO
and
NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR LOCAL 627, IUOE IN OPPOSITION

J. ALBERT WOLL
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005
MICHAEL FANNING
1125 Seventeenth Street, N.W.
Washington, D.C. 20036
LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Local 627, IUOE

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.
9

13858-4-76

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1097

SOUTH PRAIRIE CONSTRUCTION CO., *Petitioner,*

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and

NATIONAL LABOR RELATIONS BOARD.

No. 75-1243

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR LOCAL 627, IUOE IN OPPOSITION

1. *The Background.* The Court of Appeals identified the parties to this controversy and stated in summary form the genesis of the dispute between them:

> "Peter Kiewit Sons' Co. ('Kiewit') and South Praire Construction Co. ('South Prairie') * * *

are wholly-owned operating subsidiaries of Peter Kiewit Sons', Inc. ('Kiewit, Inc.') * * *. For many years, Kiewit was engaged in construction work, including heavy and highway construction in Oklahoma * * *. Local 627 has represented Kiewit's employees continuously since 1960. [Kiewit and Local 627, International Union of Operating Engineers were parties to a collective agreement] effective between July 1970 and 1973 * * * covering heavy and highway construction. Kiewit was the only highway contractor in Oklahoma to have a signed agreement with a union, and its wage costs were higher than those of its competitors * * *. Kiewit, Inc. [therefore] decided that [its subsidiary] South Prairie, a * * * contractor [which Kiewit, Inc. had determined would operate on a non-union basis and which had] engaged for many years in heavy and highway construction work outside Oklahoma, should be activated in Oklahoma * * *. On or about February 25, 1972 [South Prairie] began doing business [in Oklahoma] as a highway contractor.

"Commencing in March 1972, Local 627's business agent, Ellis, * * * sought unsuccessfully to have Kiewit and South Prairie agree to apply the Union's agreement with Kiewit to South Prairie's work. On June 20, 1972, the day South Prairie bid on four Turnpike Authority jobs, Local 627 filed the [refusal to bargain] charge that led to the proceedings below." (Co. Pet. App. pp. 2a-5a, 8a.) [1]

[1] South Prairie Construction Co. is the petitioner in No. 75-1097. Its petition is referred to herein as "Co. Pet.", and the Appendix to its petition is referred to as "Co. Pet. App.". The National Labor Relations Board is the petitioner in No. 75-1243. The NLRB's petition is referred to herein as "Bd. Pet." The decisions below are set out at Co. Pet. App. pp. 1a-88a.

2. *The Decision Below.* The Court of Appeals stated the "key issue" to be "whether, for purposes of the National Labor Relations Act, Kiewit and South Prairie are separate employers, as determined by the Board, or a 'single employer', as determined by the ALJ [Administrative Law Judge]." Consequently, that court recognized that the "controlling criteria, * * * interrelation of operations, common management, centralized control of labor relations, and common ownership * * *" are those "set out and elaborated in [those] Board decisions" this Court cited with approval in *Radio Union* v. *Broadcast Serv.*, 380 U.S. 255, 256-257. (Co. Pet. App. pp. 2a, 8a.)

After reviewing the facts in painstaking detail (Co. Pet. App. pp. 2a-8a, 13a-14a), fully analyzing the Board decisions cited in *Radio Union* (Co. Pet. App. pp. 8a-10a), and explaining the defects in the Board's cursory discussion of the record (compare Co. Pet. App. pp. 11a-15a with *Id.*, pp. 24a-25a), the Court of Appeals held "that the Board's finding that respondent Kiewit and South Prairie are separate employers for the purposes of the National Labor Relations Act is not warranted by the record" (Co. Pet. App. pp. 14a-15a). And, since "Kiewit and South Prairie are engaged in the same class of construction work in the same locality; and the Board gave no indication that, if a 'single employer' status obtained, it would have disagreed with the ALJ's conclusion that Kiewit and South Prairie employees constitute an appropriate unit for collective bargaining purposes," the Court of Appeals held also "that the Board erred in finding that Kiewit and South Prairie had no obligation to recognize Local 627 as the bargaining representative of South Prairie's employees or to extend the terms of

the Union's agreement with Kiewit to South Prairie's employees." (Co. Pet. App. pp. 16a, 19a-20a.)

Judge Tamm dissented on the ground that "vacation of the Board's order * * * resulted from a factual disagreement between" the Court of Appeals majority and the Board. He emphasized that there was "no dispute in this case regarding the applicable legal standard" and that the "controversy" within the lower court was "simply over the application of those indicia of control to this factual context." Indeed he further narrowed that "controversy" by expressing his own doubts as to the Board's ruling: "Were we deciding this case de novo, I might agree with the majority." (Co. Pet. App. pp. 20a-21a.)

3. *The Contention That The Court of Appeals Erred By Rejecting the Board's Finding That Kiewit And South Prairie Are Not A Single Employer* (Co. Pet. pp. 10-12; Bd. Pet. pp. 12-16) *Is Insubstantial.* In *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 173-174, the most recent decision on this point, this Court affirmed once again that unless a "Court of Appeals [can] be said to have 'misapprehended or grossly misapplied' the governing standard" stated in *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, for determining whether Board findings are supported by substantial evidence, "there is no justification for this Court's intervention, since *Universal Camera* precludes us from substituting our judgment for that of the Court of Appeals. 'This is not the place . . . to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . ', *NLRB* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 503 (1951); see *Central Hardware Co.* v. *NLRB,* 407 U.S. 539, 548 (1972)."

The petitioners have not come close to meeting this heavy burden of persuasion. The court below did not misapprehend or misapply the *Universal Camera* standard; rather, its decision is responsive to Mr. Justice Frankfurter's admonition that "reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. * * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." (*Universal Camera,* 340 U.S. at 490.)

The Board stated in two paragraphs reproduced at Co. Pet. App. pp. 24a-25a, the basis for its conclusion that applying the *Radio Union* criteria to the facts here, Kiewit and South Prairie are separate employers for the purposes of the Act. That statement shows that "common ownership" is undisputed. As the Court of Appeals noted, the Board decision "did not refer to the criteria of interrelation of operations and common management". (Co. Pet. App. p. 13a.) While the Board did refer to isolated facts tending to "indicate an absence of interrelation of operations or common management", the agency did not "even comment upon * * * the facts and circumstances [that] evidence a substantial qualitative degree of interrelation of operations and common management". (Co. Pet. App. pp. 13a-14a.) The Court of Appeals inquiry into the contrary evidence was quite proper, for the very point of the *Universal Camera* standard is to assure that the courts do not "determine the substantiality of evidence supporting a Labor Board deci-

sion merely on the basis of evidence which in and of itself justified it without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." (340 U.S. at 487.)

Finally, the Board's decision implies that the "common control of labor relations policies" criteria was not satisfied here because Kiewit, Inc. and Kiewit had not exercised their undisputed right to control South Prairie's labor relations policies. (Co. Pet. App. pp. 24a-25a.) The Court of Appeals pointed out that "the parent company, Kiewit, Inc., and its wholly-owned subsidiary, Kiewit, decided that South Prairie would operate on a non-union basis in Oklahoma" and that this "constitutes a very substantial qualitative degree of centralized control of labor relations". (Co. Pet. App. pp. 11a, 12a.) That being so, the court below recognized that the Board, without acknowledgment or justification, had departed from the rule stated in *Sakrete of Northern California, Inc.* v. *NLRB,* 332 F.2d 902 (C.A. 9), *cert. denied,* 379 U.S. 961, one of the cases cited with approval in *Radio Union.* There the Ninth Circuit had stated:

> "even if the substantial evidence shows interrelationship of operations, centralized control of labor relations, or common management only at the executive or top level, we do not agree that this precludes application of the 'single employer' concept;"

and had pointed out that these three criteria "deal not with power and authority, as such, but with its exercise," and that such criteria, "on any level, are considerations in addition to the factor of common ownership or financial control." (332 F.2d, at 907.) The Court of Appeals therefore concluded that this portion

of the Board's decision was as defective as the remainder.

In sum, the Court of Appeals, like the Board's Administrative Law Judge, simply concluded that when all of the evidence was considered in light of the criteria stated by this Court in *Radio Union,* the only conclusion they could conscientiously reach was that Kiewit and South Prairie are a single employer for purposes of the Act. That was not error at all, much less the plain error required to justify this Court's intervention into a factual dispute.

4. *The Contention That The Court of Appeals Erred By Reversing The Board's Dismissal Of The Complaint* (Co. Pet. pp. 9-12; Bd. Pet. pp. 13-16) *Is Belied By The Rationale Of The Board's Decision.* In a "single employer" case there are potentially two issues: Are the nominally separate entities a single employer? If so, do their employees constitute a single bargaining unit? Thus, as the Board noted, citing *Central New Mexico Chapter,* 152 NLRB 1604, where there are differences between the work done by one entity and the other, a "single employer" finding does not mean that it is appropriate to extend a collective bargaining agreement with one entity to the other. (Co. Pet. App. pp. 23a-24a.) But, as the Board also recognized, where, as here, both entities are doing the same work in the same place, a "company which has not agreed to be bound by the collective bargaining agreement of another company may neverthless be held to that contract if it * * * may be said to constitute a single employer with that company." (Co. Pet. App. p. 24a.) Under these circumstances, as the Board itself said, "South Prairie's potential liability under the Kiewit contract therefore must turn on the issue of

whether the two companies constitute a single employer for collective bargaining purposes." (Co. Pet. App. p. 24a.) In other words, in this case the two potential issues are necessarily fused into one, and the sole factor determining liability is "whether the two companies constitute a single employer for collective bargaining purposes."

The Court of Appeals understood the Board's decision as stating that once it was determined that South Prairie and Kiewit are a single employer, the conclusion that the Kiewit contract applies to South Prairie follows ineluctably:

> "Here Kiewit and South Prairie are engaged in the same class of construction work in the same locality; and the Board gave no indication that, if a "single employer" status obtained, it would have disagreed with the ALJ's conclusion that Kiewit and South Prairie employees constitute an appropriate unit for collective bargaining purposes." (Co. Pet. App. p. 16a.)

The foregoing analysis of the Board's decision shows the Court of Appeals' understanding to be fully justified.

Thus, on the premises of the Board's own decision, this case, unlike *NLRB* v. *Food Store Employees,* 417 U.S. 1, relied on by petitioners, *does* "present the exceptional situation in which crystal clear Board error renders a remand an unnecessary formality." (*Id.* at 8.)

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

J. ALBERT WOLL
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

MICHAEL FANNING
1125 Seventeenth Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Local 627, IUOE

see

7 5

1 2 4 3